ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 20-1289 and 12-1366 (consolidated)

TRANSCANADA POWER MARKETING LTD.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

The parties to the underlying agency proceedings and who have appeared before the Court are listed in Petitioner's Rule 28(a)(1) certificate.

B. Rulings Under Review

1. *ISO New England Inc.,* Order on Compliance and Remand, 171 FERC ¶ 61,003 (April 1, 2020), R. 56, JA ___;

2. *ISO New England Inc.*, Order Granting Rehearing for Further Consideration (June 1, 2020), R. 58, JA ___; and

3. *ISO New England Inc.*, Order Addressing Arguments Raised on Rehearing, 172 FERC ¶ 61,163 (Aug. 27, 2020), R. 61, JA ___.

C. Related Cases

The Commission orders challenged in this case were issued in response to this Court's remand in *TransCanada Power Marketing Ltd. v. FERC*, 811 F.3d 1 (D.C. Cir. 2015). Counsel is not aware of any other related cases pending in this Court or any other Court.

/s/ Robert M. Kennedy
Robert M. Kennedy
Senior Attorney

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Br.	Brief of Petitioner TransCanada Power Marketing Ltd.
Bid Results Order	*ISO New England, Inc.*, 145 FERC ¶ 61,023 (2013) (R. 24), JA ___
Bid Results Rehearing Order	*ISO New England, Inc.* 147 FERC ¶ 61,027 (2014) (R. 34), JA ___
Commission or FERC	Federal Energy Regulatory Commission
Ethier Testimony	Testimony of Robert G. Ethier, dated January 23, 2017, Exhibit C to Remand Compliance Filing (R. 41), JA ___
ISO New England or System Operator	ISO New England Inc., the independent operator of the high-voltage electric transmission network in the Northeast and administrator of the region's wholesale electricity markets.
Joint Testimony	Joint Testimony of Robert Ethier and Peter Brandien, submitted with ISO New England Winter Reliability Program Tariff Filing (June 28, 2013), JA ___-___.
Market Monitor Report	Internal Market Monitor Report on Competition and Market Power in Winter Reliability Program 2013-14, Exhibit A to Remand Compliance Filing (R. 41), JA ___
Remand Compliance Filing	ISO New England Inc. Compliance Filing Re: Reasonableness of Bid Results (Jan. 23, 2017 (R. 41), JA ___

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TransCanada	Petitioner TransCanada Power Marketing Ltd.

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

This case returns to the Court after a 2015 remand to the Federal Energy Regulatory Commission ("Commission" or "FERC"). The Court directed the Commission to better explain why the rates associated with a program designed to ensure that the New England power system could reliably meet consumer demand for electricity during the winter of 2013-2014 were "just and reasonable," within the meaning of the

Federal Power Act. *See TransCanada Power Marketing v. FERC*, 811 F.3d 1 (D.C. Cir. 2015).

The Winter Reliability Program at issue arose from a review conducted by ISO New England Inc. ("ISO New England" or "System Operator"), the independent system operator of the high-voltage electric transmission network in the Northeast and administrator of the region's wholesale electric markets, of the power system's performance during the winter of 2012-2013. The System Operator observed that the region had become increasingly dependent on natural gas-fired generators, which can be vulnerable to supply shortages and price volatility. And oil-fired generators – which are often called upon when natural gas-fired generators cannot meet demand – did not keep sufficient fuel supplies on hand to meet increased demand in extended cold snaps. To address these matters, ISO New England proposed tariff provisions implementing a one-year Winter Reliability Program. The Program would, among other things, compensate oil-fired generators, selected through an auction process, to have sufficient supplies of oil on hand at the beginning of winter so they would be able to generate electricity when called upon by the System Operator.

The Commission approved the Winter Reliability Program, subject to an adjustment in the allocation of costs. *See ISO New England, Inc.*, 144 FERC ¶ 61,204 (2013) ("Tariff Order"), *reh'g denied*, 147 FERC ¶ 61,026 (2015). In a separate proceeding, the Commission found that the Program's bid results – i.e., the resulting Program rates – were just and reasonable. *See ISO New England, Inc.*, 145 FERC ¶ 61,023 (2013) (R. 24) , *reh'g denied*, 147 FERC ¶ 61,027 (2014) (R. 34).

Petitioner TransCanada Power Marketing Ltd. ("TransCanada") appealed. In a 2015 opinion, the Court rejected TransCanada's challenges to the Commission's approval of the Winter Reliability Program itself, but found that the Commission had failed to adequately explain why it believed the Program's rates were just and reasonable. *See TransCanada*, 811 F.3d at 12-13.

On remand, the Commission used a market-based approach to review the bid results and considered expert analyses provided by ISO New England and its internal market monitor. The Commission found that there was no evidence that the bid results stemmed from an exercise of market power and thus again concluded that they were just and reasonable. *See ISO New England, Inc.*, 171 FERC ¶ 61,003 (2020)

(R. 56), JA ___, *reh'g denied*, 172 FERC ¶ 61,164 (2020) (R. 61), JA ___.

The issue presented on appeal is:

Whether the Commission complied with the *TransCanada* Court's remand, which directed the Commission to more fully explain why the Winter Reliability Program's resulting rates were "just and reasonable," within the meaning of the Federal Power Act.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Power Act

Section 201 of the Federal Power Act, 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and wholesale sale of electric energy in interstate commerce. This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction).

The Act provides that "[a]ll rates and charges … by any public utility for or in connection with the transmission or sale of electric

energy," and "all rules and regulations affecting or pertaining to such rates and charges," must be "just and reasonable," and not "undu[ly] preferen[tial]" or "undu[ly] prejudicial" 16 U.S.C. §§ 824d(a), (b).

The reasonableness of any particular rate is assessed in light of the Act's goal of promoting reliable service and the development of energy supplies. *See*, *e.g.*, *Consol. Edison Co. v. FERC*, 510 F.3d 333, 342 (D.C. Cir. 2007) ("the FPA has multiple purposes in addition to preventing 'excessive rates' including protecting against 'inadequate service' and promoting the 'orderly development of plentiful supplies of electricity'") (internal citations omitted); *accord Cent. Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92, 111 (2d Cir. 2015); *see also NAACP v. FPC*, 425 U.S. 662, 669-70 (1976) (finding it "clear" that the "principal purpose" of the Natural Gas Act and Federal Power Act "was to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices").

Under section 205 of the Federal Power Act, a public utility seeking to change any rate or rule must file the proposed change with the Commission. 16 U.S.C. § 824d(d). The utility bears the burden of showing that the change is just and reasonable. *Id.* § 824d(e). When

reviewing a proposed change under section 205, "the Commission undertakes 'an essentially passive and reactive role' and restricts itself to evaluating the confined proposal." *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017) (quoting *City of Winnfield v. FERC*, 744 F.2d 871, 875-76 (D.C. Cir. 1984)).

B. Developing Regional Markets

Historically, electric utilities had been vertically integrated monopolies, with a single utility controlling the generation, transmission, and distribution of electricity in a geographic region. Since the 1970s, a combination of technological advances and policy reforms has given rise to market competition among power suppliers. *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 535-36 (2008).

One such policy reform was the Commission's decision to order the functional unbundling of wholesale generation and transmission services, requiring utilities to provide open, non-discriminatory access to their transmission facilities to competing electricity suppliers. *See New York*, 535 U.S. at 11-13. To reduce the technical inefficiencies associated with different utilities operating different parts of the grid,

the Commission encouraged transmission providers to establish "Regional Transmission Organizations," which would have operational control over the facilities owned by transmission providers. *See Morgan Stanley*, 554 U.S. at 536-37 (citing Order No. 2000, 65 Fed. Reg. 810, 811-12 (2000)). The Commission also encouraged the management of these Regional Transmission Organizations by "Independent System Operators," not-for-profit entities that operate transmission facilities in a non-discriminatory manner. *Id*.

C. Overview Of The New England Market

In the Northeast, ISO New England is the entity that operates the regional transmission system and administers bid-based energy markets across six States (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont). *See generally NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 796 (D.C. Cir. 2007). These FERC-jurisdictional wholesale markets facilitate the sale of electricity by generators to electric utilities and electricity traders before it is eventually sold to consumers. The rates charged by ISO New England for access to the transmission system and the rules for the wholesale markets are set forth in a "single, unbundled, grid-wide tariff." *NRG*

Power Mktg., LLC v. Me. Pub. Utils. Comm'n, 558 U.S. 165, 169 n.1 (2010) (quoting *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004)).

The Winter Reliability Program at issue here was a temporary construct that operated in tandem with the established ISO New England markets. A general overview of those markets is set forth below.

1. The players

The fundamental product underlying ISO New England's markets is the electric energy produced by generators, whose facilities convert fuels such as oil, natural gas, uranium, or the energy inherent in wind, sunshine, or water, into a flow of electrons. That flow of electrons is then transmitted over high-voltage power lines operated by ISO New England on behalf of its member transmission owners.

The electric energy is received by local public utilities and other retail suppliers, like TransCanada, who in turn distribute that electricity to consumers. The amount of energy required by end users is called "load," and thus local utilities are sometimes referred to as "load-serving entities." *See TransCanada*, 811 F.3d at 4-5; *see also* FERC,

ENERGY PRIMER: A HANDBOOK OF ENERGY MARKET BASICS 35-36 (Apr. 2020) (Energy Primer).[1] The wholesale purchase of electricity and related services is FERC-jurisdictional. Retail transactions between local utilities and their end-use customers are state-jurisdictional.

2. The energy markets

In the day-ahead New England energy market, load-serving entities submit orders for electricity and generators submit supply offers one day before the electricity is needed. ISO New England uses these orders and offers to construct supply and demand curves for this market. The intersection of these curves identifies the market-clearing price, which "is then paid to every supplier whose bid was accepted" – i.e., supply offers below the identified price – "and the total cost is split among the [load-serving entities] in proportion to how much energy they have ordered." *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 768 (2016).

A real-time energy market allows market participants to respond to changes in anticipated supply or demand throughout the operating

[1] The Energy Primer is available at https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020.pdf.

day. *See* Energy Primer at 77. To avoid overloads and blackouts, "operators must plan and operate power plants and the transmission grid so that demand and supply exactly match, every moment of the day, every day of the year, in every location." *Id.* at 36.

During the operating day, generators are usually called upon to provide service in order of economic merit – i.e., units offering the lowest bids to supply power are dispatched first. At times, however, "generators whose bids exceed the market-clearing price are called into service to ensure system reliability" via "out-of-merit dispatch." *Braintree Elec. Light Dept. v. FERC*, 667 F.3d 1284, 1288 (D.C. Cir. 2012) (internal quotations omitted).

II. THE WINTER RELIABILITY PROGRAM

A. New England's Winter Reliability Problem

The winter of 2012-2013 was relatively mild by New England standards, but ISO New England saw trouble on the horizon. The makeup of the region's generating fleet was changing. Historically, most of New England's electricity was supplied by generators that had ready stockpiles of fuel on site, such as oil, coal, and nuclear facilities. By 2012, however, natural gas generators supplied more than half of the region's electricity. *See* Joint Testimony of Robert Ethier and Peter

Brandien at 3 ("Joint Testimony"), JA ___, submitted with ISO New England Winter Reliability Program Tariff Filing (June 28, 2013) ("Tariff Filing"), JA ___. And the vast majority of these generators relied upon "just-in-time" fuel delivery – i.e., pipeline transportation capacity purchased as it is released by holders of long-term, firm transportation rights (generally local gas companies). But when cold snaps hit, most natural gas is committed to local public utilities for residential, commercial, and industrial heating. As a result, natural gas generators cannot procure all the fuel they need to run. *See* Joint Testimony at 4, JA ___.

Normally, the System Operator could call upon oil-fired generators to make up any shortfall. But ISO New England found that, because oil units were not being called up to generate much electricity during the year, they did not maintain full oil tanks (with the average being only one-third full). As a result, oil-fired generators were often unable to sustain operations during extended, or repeated, cold snaps. *See* Tariff Filing at 5, JA ___; Joint Testimony at 9, JA ___. *See generally Braintree*, 667 F.3d at 1287 (discussing use of oil-fired generators for reliability purposes).

B. ISO New England's Proposal

In order to address these issues, on June 28, 2013, ISO New England proposed tariff revisions that would help it maintain the reliable operation of the power system during the 2013-2014 winter.

1. The Program components

The proposed Winter Reliability Program had four components. Under the demand response element, ISO New England solicited bids from, and paid compensation to, electricity consumers for their commitment not to use power when directed by the System Operator. *See* Tariff Order PP 4-8, JA ___-___. The Program's oil inventory service compensated selected oil-fired generators for filling their tanks at the start of winter and then submitting daily supply offers into energy markets in the ensuring months. *Id*. PP 9-11, JA ___-___.

The duel-fuel testing component applied to electric generators capable of running on either oil or natural gas. These generators would be compensated for pre-winter tests demonstrating that their units were capable of switching between fuels within five hours. *Id*. P 12, JA ___. Finally, the Winter Reliability Program made changes to the energy market's mitigation rules to allow generators to more easily switch between fuels. *Id*. PP 13-15, JA ___-___.

2. How the oil inventory service works

Most relevant to this appeal is the Program's oil inventory service. To calculate what was needed for the upcoming winter, ISO New England studied how the existing fleet would perform in meeting the demand projected for 2013-2014 while experiencing temperatures from the 2003-2004 winter (the coldest in the previous decade) and the associated fuel shortages for natural gas generators. The result was a need for approximately 2.4 million megawatt-hours from oil-fired generators, or 4.2 million barrels of oil, for the winter of 2013-2014. *See* Tariff Filing at 6, JA ___; *see also* Joint Testimony at 14-15, JA ___-___.

Oil inventory service would be procured through an auction mechanism. Participating generators would submit bid sheets to ISO New England specifying the amount of oil they will have on-site by December 1 (expressed in the equivalent megawatt-hours) as well as the price for that service. *See* Tariff Filing at 23, JA ___; Joint Testimony at 27, JA __.

ISO New England would analyze the bids based on price, as well as reliability-related factors such as a generator's historic performance, flexibility in responding to contingencies, and location. *See* Tariff Order

P 29, JA ___; *see also* Tariff Filing at 23 (discussing bid evaluation criteria), JA ___. ISO New England made clear that it could purchase less than the 2.4 million megawatt-hours target if costs become too high. *See* Joint Testimony at 29 (ISO New England "is not required to purchase the entire 2.4 MWh and may exercise its discretion to purchase less").

Successful bidders would receive monthly payments in December, January, and February based on their as-bid price. In exchange, the generator must run when called upon by the System Operator. Failure to do so subjects the generator to penalties. *See* Tariff Filing at 15-16, JA ___. ISO New England explained that it chose an as-bid auction mechanism – rather than a uniform price auction where all selected generators are paid the same price – because the System Operator would be choosing winners based on reliability attributes in addition to cost. A uniform price would therefore be inappropriate since selected resources would not be "providing the same fungible service." Joint Testimony at 18, JA ___.

ISO New England estimated that the Program would cost between $16 to $43 million. *See* Joint Testimony at 29-30, JA __-__. The System

Operator explained that it would not be entering into separate contracts with winning bidders, as the bid sheets constituted a binding commitment to abide by the terms of the Program. *See* Tariff Filing at 24, JA ___. The bid results would be filed with the Commission, however, as they constituted "rates, terms, and conditions" of service under section 205 of the Federal Power Act, 16 U.S.C. § 824d. *See id.*

III. THE COMMISSION PROCEEDINGS

A. The Commission Accepts The Winter Reliability Program

In a September 16, 2013 order, the Commission conditionally accepted the Winter Reliability Program. The Commission found the Program to be "an appropriate solution" as a temporary measure to address "the particular challenges to reliability" posed by the nature of the New England generation fleet. Tariff Order P 21, JA ___. The Commission determined that the bid-based compensation for oil inventory service, with selection to be "based on both price and non-price factors," was just and reasonable, "given the urgency of the need to protect reliability and the interim nature" of the Program. *Id.* P 54, JA ___. The Commission, however, rejected ISO New England's proposal to allocate Program costs to transmission customers, finding

instead that they should be allocated to load-serving entities (serving end-use customers), the Program's primary beneficiaries. *Id*. P 70, JA ___.

B. The Bid Results

1. The first auction

Due to time constraints, ISO New England conducted the first auction under the Winter Reliability Program in July 2013, before the Program was approved by the Commission. The bids received were inadequate, totaling only 1.415 million of the 2.4 million megawatt-hours sought at a price of $60.66 million. *See* ISO New England Emergency Amendments at 2 (Aug. 9, 2013), JA ___.

After speaking with generators to determine the reasons for the low level of participation, ISO New England, after modifying the penalty amounts and accelerating the regulatory process, conducted a second auction in August 2013.

2. The second auction

In that auction, ISO New England received bids totaling 2.29 million megawatt-hours (96% of the target), at a cost of $114.3 million. *See* ISO New England Winter Reliability Bid Results (Aug. 23, 2013) (R. 1), JA ___. In an effort to balance the need for winter reliability

with the cost to consumers, the System Operator proposed to accept 1.995 million megawatt-hours (83.1% of the target), with all bids at or below $31 per megawatt-hour per month, for a total cost of $78.8 million. *Id.* at 2-3, JA ___-___. The selected bids included 3,780 megawatt-hours of demand response, with the balance (1,991,200 megawatt-hours) coming from oil inventory service.

3. The Commission's conditional acceptance

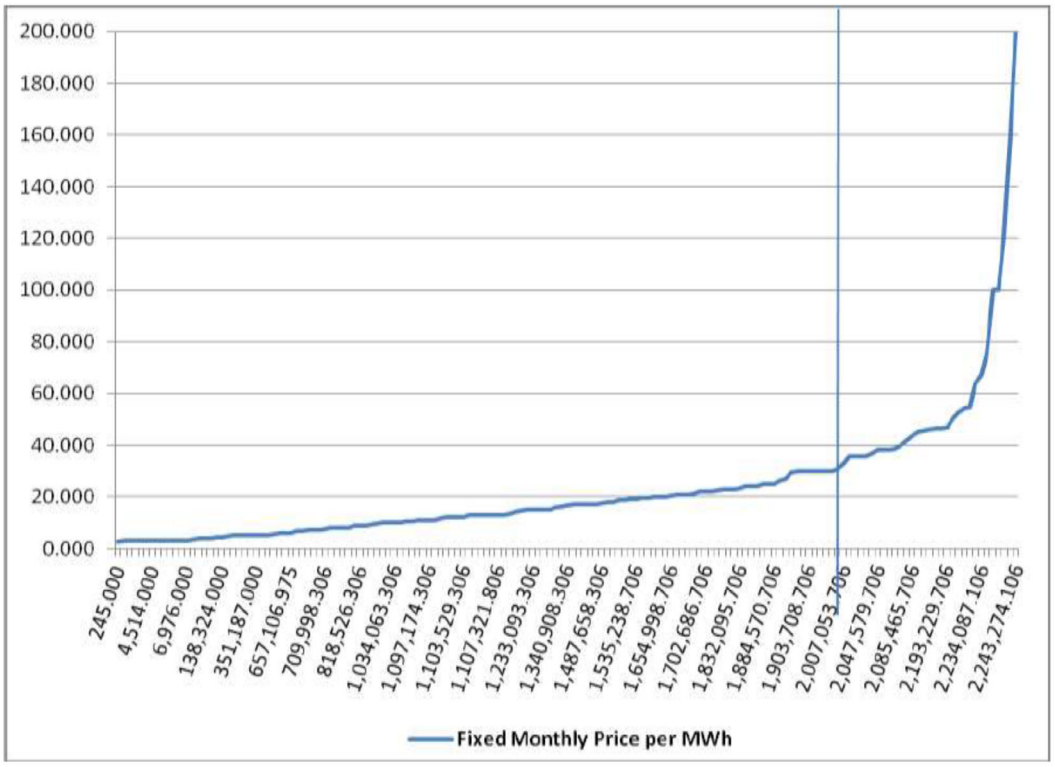
The Commission conditionally accepted the bid results in an October 7, 2013 order. *ISO New England, Inc.*, 145 FERC ¶ 61,023 (2013) (R. 24) ("Bid Results Order"), JA ___. In doing so, the Commission acknowledged that there was a disparity between the Winter Reliability Program's projected costs ($16 to $43 million) and its actual cost ($78.8 million). The Commission explained, however, that the Program was "a novel approach" to address manifest reliability concerns and thus "does not lend itself to precise cost predictions." Bid Results Order P 25, JA ___.

The Commission found that, although ISO New England had complied with the tariff requirement to submit a list of participants selected for the Program and the prices they would be paid (*id.* P 24,

JA __), the agency had "envisioned a more detailed filing" describing the System Operator's process of evaluating bids. *Id.* PP 26-30, JA ___-___. Accordingly, ISO New England was directed to submit a compliance filing discussing that process. *Id.* P 30, JA ___.

4. ISO New England's compliance filing

In its subsequent compliance filing, ISO New England explained that it had first arranged all eligible bids from lowest to highest cost, and then evaluated the resulting supply offer curve. *See* ISO New England Bid Results Compliance Filing at 3-4 (Oct. 15, 2013) (R. 25), JA ___-___. The curve – set forth below – showed a sharp break at $31 per megawatt-hour per month. At that point, the next tranche of service would increase costs by 5.6% ($4.4 million) for a mere 2% gain in the target procurement amount. Lowering the cutoff to $30 per megawatt-hour per month would decrease costs by 10% ($7.3 million), but result in a 13% loss in the procurement amount, reducing it to only 70.5% of the target. *See id.* at 4, 7, JA ___, ___.



Id. at 4, JA ____.[2]

ISO New England next looked at the reliability characteristics of the remaining resources – e.g., historic availability and performance, ability to ramp up or down in response to contingencies during the operating day – and their geographic distribution, with particular attention to proximity to areas of high demand. *Id.* at 5-6, JA ___-___. Based on this review, the System Operator determined that it was unnecessary to replace or supplement any of the generators within the

[2] In the graph, the horizontal axis represents tranches of megawatt-hours, while the vertical axis shows bids in dollars per megawatt-hour.

selected group with more expensive units offering greater reliability and flexibility benefits. *Id.* at 5, JA ___.

In addition, due to minor bid corrections from auction participants, ISO New England revised its proposed procurement quantity to 1.95 million megawatt-hours. The associated cost of the Program was likewise reduced to $75 million. *Id.* at 7, JA ___.

ISO New England's compliance filing was uncontested and accepted by the Commission in a November 13, 2013 letter order. (R. 31), JA ___.

C. The Commission Denies Rehearing

In an April 2014 order, the Commission denied rehearing of its conditional acceptance of the Winter Reliability Program's bid results. *ISO New England, Inc.* 147 FERC ¶ 61,027 (2014) ("Bid Results Rehearing Order") (R. 34), JA ___. The Commission explained that, in determining that the bid results were just and reasonable, it had "balanced the actual costs … with the need to make such expenditures to address pressing reliability risks." *Id.* P 15, JA ___. On the cost side of the equation, the Commission noted that the Winter Reliability Program employed "a competitive as-bid" mechanism to select

generators "based on both price and non-price factors." *Id.* It is thus "reasonable that participants with greater reliability benefits will be paid higher prices." *Id.* The Commission found no evidence "that participants included excessive profits unrelated to actual risks and costs in submitting their bids." *Id.* (internal quotations omitted).

D. The Program Proves Successful

The Winter Reliability Program was critical to keeping the lights on in New England during the winter of 2013-2014. The Program successfully "bridged the reliability gap created by the colder than average winter weather." *ISO New England Inc.*, 148 FERC ¶ 61,179, P 3 (2014). That winter saw natural gas prices soar and – unusually – exceed oil prices on 57% of winter days. As a result, oil generators were dispatched before natural gas generators based on economic merit.

In total, 88 percent of the oil procured through the Program was burned during the winter. *Id.* ISO New England levied $9 million in penalty charges under the Program, reducing its net cost to $66 million. *See* ISO New England Inc. Compliance Filing Re: Reasonableness of Bid Results, Exhibit A at 10 (Jan. 23, 2017) (R. 41) ("Remand Compliance Filing"), JA ___. That is the same amount ISO New England was

required to pay the prior winter to generators dispatched out of economic merit for reliability purposes. *See* Joint Testimony at 5-6, 13, JA ___-___, ___.

Winter reliability issues continue to vex New England. ISO New England implemented reliability programs similar to that at issue here for the winters of 2014-2015 through 2017-2018. *See ISO New England Inc.*, 152 FERC ¶ 61,190 (2015) (accepting Winter Reliability Programs for 2015/2016, 2016/2017, 2017/2018), *reh'g denied*, 154 FERC ¶ 61,133 (2016). It was anticipated that the issue would be resolved through market rule changes implemented in 2018. *See ISO New England Inc.*, 147 FERC ¶ 61,172 (2014) (accepting "Pay-for-Performance" proposal), *reh'g denied*, 153 FERC ¶ 61,223 (2015), *aff'd sub nom.*, *New England Power Generators Ass'n v. FERC*, 879 F.3d 1192 (D.C. Cir. 2018). But ISO New England found it necessary to implement another temporary program (the Inventoried Energy Program), while it continues to work with stakeholders on a long-term market design solution. *See ISO New England Inc.*, 171 FERC ¶ 61,235 (2020), *appeal docketed Belmont Municipal Light Dep't, et al. v. FERC*, D.C. Cir. Nos. 19-1224, *et al.*

IV. THE *TRANSCANADA* OPINION

TransCanada sought judicial review of the Commission's approval of the Winter Reliability Program, its determination that the bid results were just and reasonable, and its decision to allocate the costs of the Program to load-serving entities. The Court found no merit in TransCanada's challenge to the Commission's cost-allocation decision. *See TransCanada*, 811 F.3d at 9-11. And "[f]or the most part, [the Court] found FERC's decisions in support of the Program to be clear, well supported, and reasonable." *Id.* at 11.

The Court nevertheless remanded the case back to the agency, to the extent that the Commission failed to adequately explain why it believed the Program rates were just and reasonable and did not provide generators with excessively high profits. *Id.* at 11-14. The Court found that the Commission had "provided no explanation for why it believed that the Program was competitive. Nor did FERC purport to explain the economic forces that it believed restrained the suppliers in their confidential bid offers." *Id.* at 13. The Court offered the Commission a choice on remand: better explain its determination, or revise its disposition to ensure that the rates under the Program are

just and reasonable. *Id.* at 3-4, 14.

V. THE REMAND PROCEEDINGS

In response to the Court's remand, the Commission directed ISO New England to gather from Program participants the basis for their bids, including an explanation of the process used to formulate the bids, and to file with the Commission a compilation of this information. *See ISO New England Inc.*, 156 FERC ¶ 61,097, P 15 (2016) (R. 38), JA ___.

The Commission also directed ISO New England's internal market monitor to evaluate the competitiveness of the Winter Reliability Program and assess whether any amounts exceeding the participating generators' cost of providing service are indicative of an exercise of market power. *Id.* PP 15-17, JA ___-___. (ISO New England's Internal Market Monitor is a department composed of economists, engineers, statisticians, and analysts. The department functions independently of ISO New England's management and reports directly to the System Operator's Board of Directors. *See* https://www.iso-ne.com/markets-operations/market-monitoring-mitigation/internal-monitor)). The Commission also asked ISO New England to furnish its own

recommendation as to the reasonableness of the Program's bids. *See ISO New England Inc.*, 156 FERC ¶ 61,097 at P 15, JA ___.

A. ISO New England's Remand Compliance Filing

On January 23, 2017, ISO New England submitted a compliance filing in response to the Commission's directives. *See* Remand Compliance Filing, JA ___-___. The filing included (1) bid information collected from participating generators, (2) a report from the Internal Market Monitor regarding the competitiveness of the Program, and (3) an analysis and recommendation from the System Operator as to the reasonableness of the bid results.

Because the generators' actual bid information was commercially sensitive and confidential to the specific generators, it was filed under seal. *See* Remand Compliance Filing at 2, JA ___. ISO New England also filed a public version of the Internal Market Monitor's report, and the confidential information was available to the Commission and any party who complied with the Commission's regulations regarding access to such information. *See ISO New England*, 156 FERC ¶ 61,097 at P 17 n.34 (citing 18 C.F.R. § 388.112), JA ___.

1. The Internal Market Monitor's report

The Internal Market Monitor first assessed the structural

competitiveness of the Winter Reliability Program – i.e., whether there was a sufficient number of suppliers and whether their supply was needed to meet demand. The Internal Market Monitor concluded that the market was not, in fact, structurally competitive. A large portion of the necessary supply was concentrated in four market participants and the first round of the auction failed to attract sufficient supply, thus potentially alerting participants to their market power. *See* Remand Compliance Filing, Exhibit A: Internal Market Monitor Report ("Market Monitor Report") at 11, JA __.

The Internal Market Monitor went on to assess whether any of the market participants' bids reflected an exercise of that market power. To do so, the Internal Market Monitor estimated a supply curve based on the costs incurred by market participants, derived from data supplied by bidders and independent sources. *Id*. at 17-19. On the demand side of the market, the Internal Market Monitor used the actual level of service procured by the Program (1.95 million megawatt-hours). *Id*. at 19, JA ___. The intersection of these curves reflected a marginal bid (i.e., the highest cleared bid) of $15.08 per megawatt-hour-per-month. The Internal Market Monitor found, however, that it was

appropriate to adjust that price upward.

In a pay-as-bid auction format, market participants have an incentive to raise their bid price to just below the expected highest cleared bid price. *Id.* at 16, JA ___. And here market participants lacked information necessary to precisely estimate the expected marginal bid – e.g., limited information of the auction's supply and demand curves; no historical data to consider when estimating the value of the reliability services sought by the System Operator. As a result, the bidders were likely to have adjusted their bid prices upward. *Id.* at 20-21, JA ___-___. To account for this, the Internal Market Monitor adjusted its estimate of the cost-based supply curve upward by 25%, resulting in an expected marginal bid of $18.85 per megawatt-hour-per-month. The Internal Market Monitor then assumed that bids below this threshold did not reflect an exercise of market power. *Id.* at 21, JA ___.

Based on this analysis, the Internal Market Monitor found that "the vast majority (75%) of supply offered did not attempt to exercise market power." *Id.* at 15, JA ___. The remaining 25% of bids above the expected marginal bid ($6.6 million or 9% of the total cost of the

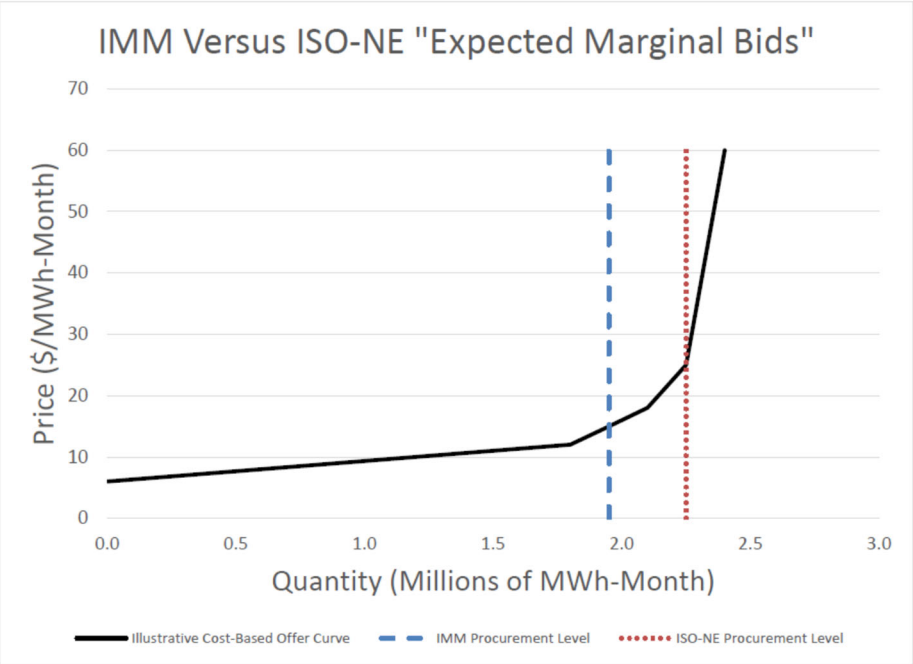
Program) "included sufficiently high markups to raise [market power] concerns." *Id.* But a number of factors – such as the novelty of the Program and its impact on generators' risk assessments, the pay-as-bid format, and measurement accuracy issues – prevented the Internal Market Monitor from concluding that any market participants actually exercised market power. *Id.* at 2-3, 15, JA ___-___, ___.

2. ISO New England's analysis

ISO New England conducted its own analysis of the Program's results after reviewing bidder data and the Internal Market Monitor's report. That analysis followed the Internal Market Monitor's methodology, but used an assumed procurement level of 2.25 million megawatt-hours, closer to the Program's stated goal of 2.4 million megawatt-hours. *See* Remand Compliance Filing, Exhibit C: Testimony of Robert Ethier ("Ethier Testimony") at 7-9, JA ___-___. The figure reflects the highest priced data point on the Internal Market Monitor's cost-based supply curve (excluding a few outliers). *Id.* at 9, JA ___.

ISO New England believed that quantity was more consistent with the market participants' expectations as to the amount of service

that would be purchased by the System Operator. *Id.* at 8-9, JA ___-___. The impact of the different assumed procurement levels on the expected marginal bid price is illustrated below:



See ISO New England Inc., 171 FERC ¶ 61,003, P 86 (2020) (R. 56) ("Remand Order"), JA___.

A procurement level of 2.25 million megawatt hours results in an expected marginal bid of $31.08 per megawatt-hour-per-month (including the 25% upward adjustment). At this level, there was no evidence of market power; 89% of submitted offers, and all selected offers, were below this expected marginal bid price. Ethier Testimony at 10, JA ___.

B. The Commission's Remand Order

In an April 1, 2020 order, the Commission concluded that the Winter Reliability Program's bid results were just and reasonable. In reaching this conclusion, the Commission applied market-based economic principles – referred to as a "market-based paradigm" in the challenged orders – to review the bid results. Remand Order P 59, JA ___. The Commission found that, assuming there was structural market power, the resulting prices were "just and reasonable because there were factors" – including bidders' lack of knowledge about the level of procurement and the costs and strategies of their competitors, and how the System Operator would value the non-cost-reliability factors – "that sufficiently restrained parties' ability to exercise market power." *Id*. P 61, JA ___.

The Commission also considered the analyses submitted by the Internal Market Monitor and ISO New England. The Commission found that it was reasonable to utilize an expected procurement level of 2.25 million megawatt hours, as that more closely approximated bidders' expectations. *Id*. PP 87-88, JA ___. The Commission also found that it was reasonable to apply a 25% upward adjustment to the

cost-based supply curve, as market participants lacked certain information necessary to precisely estimate the marginal bid and thus likely adjusted their bid prices upward to compensate. *Id.* P 90 (citing Market Monitor Report at 20-21), JA ___. This adjustment resulted in an expected clearing price of $31.08 per megawatt-hour-per-month. Given that no accepted bids from the auction exceeded that price, the Commission concluded that the bid results were just and reasonable. *Id.* P 90, JA ___.

On rehearing, TransCanada argued that the Commission erred in utilizing a market-based paradigm to review the Winter Reliability Program's results. TransCanada also took issue with the supply curve utilized in the Internal Market Monitor Report and the use of a 25% upward adjustment to the estimated bid prices. The Commission addressed these arguments in an August 27, 2020 order. *See ISO New England Inc.*, 172 FERC ¶ 61,164 (2020) (R. 61) ("Remand Rehearing Order"), JA ___. This appeal followed.

SUMMARY OF ARGUMENT

This case concerns the Commission's responsibility under the Federal Power Act to balance the interests of all parties in the New

England electricity market and to ensure, to the extent possible, that electricity is available when needed most during cold winter months. While TransCanada focuses exclusively on the need to avoid excessive rates, the Commission is also obligated to protect consumers against inadequate service and promote the development of plentiful, reliable supplies of electricity.

The *TransCanada* Court's remand posed two questions to the Commission regarding the balance of these competing interests: (1) how did the Commission value the Winter Reliability Program's benefits?; and (2) why did the Commission believe the Program's rates were "just and reasonable" and did not grant generators excessive profits?

With respect to the Program's benefits, Commission explained that the Winter Reliability Program is intended to ensure that the lights stay on during the coldest stretches of winter. Accordingly, when valuing the Program's benefits, it is appropriate to consider the economic impacts of involuntary power outages, which could reach into the billions of dollars in New England.

As to the Program's costs, the Commission explained that, had

ISO New England utilized a uniform price auction (like it does in its other markets), the expected cost of the Winter Reliability Program would have exceeded its actual costs by $13 million. The Commission also examined market power analyses submitted by the Internal Market Monitor and ISO New England. The Commission explained that, when a demand level is used that appropriately corresponds with bidders' expectations, there is no evidence of market power: all accepted bids were below the expected marginal clearing price. The Commission also explained how the particular characteristics of the auction – including significant uncertainty as to the amount of reliability services that would be procured and how ISO New England would value generators' reliability attributes – would deter generators from including excessive profit margins in their bids.

TransCanada's primary response to the Commission's analysis is the assertion that only cost-based rates, or those derived from transactions conducted pursuant to the Commission's market-based rates program, are just and reasonable. The Supreme Court, however, has repeatedly emphasized that the Commission is not bound by any particular ratemaking formula.

Here, the Commission employed a market-based paradigm to review the rates resulting from a program that utilized market principles – i.e., an auction to obtain bids from sellers competing against one another to provide winter reliability service. While TransCanada takes issue with certain aspects of that analysis, it cannot seriously dispute that the Commission's conclusions were backed by substantial record evidence.

Finally, TransCanada's brief raises various claims that were not presented to the Commission on rehearing. In light of the Federal Power Act's strict exhaustion requirement, the Court lacks jurisdiction to consider them.

ARGUMENT

I. STANDARD OF REVIEW

In proceedings on remand, the Commission's determinations are reviewed to ensure that they are responsive to the Court's mandate. *See, e.g.*, *Process Gas Consumers Grp. v. FERC*, 292 F.3d 831, 840 (D.C. Cir. 2002). While it is for the Court, of course, to construe its own mandate, *see FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940), "the court's opinion may be consulted to ascertain the intent of the

mandate." *City of Cleveland v. FPC,* 561 F.2d 344, 347 n.25 (D.C. Cir. 1977) (citing cases).

The Commission's action in accepting ISO New England's proposed Winter Reliability Program is reviewed under the Administrative Procedure Act's narrow "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Under that standard, the question is not "whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. at 782. Rather, the court must uphold the Commission's determination "if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Id.* (internal quotations omitted).

The Commission's decisions regarding rate issues are entitled to broad deference because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1286 (D.C. Cir. 2011) ("[B]ecause issues of rate design are fairly technical and, insofar as they are not technical, involve policy

judgments that lie at the core of the regulatory mission, our review of whether a particular rate design is just and reasonable is highly deferential.") (internal quotation marks and citation omitted). As the Supreme Court has explained, "[t]he statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions." *Morgan Stanley*, 554 U.S. at 532. Thus, "the Commission is not bound to any one ratemaking formula." *Id.*

The Commission's factual findings are conclusive if supported by substantial evidence. *See* 16 U.S.C. § 825*l*(b). The substantial evidence standard "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (citation omitted); *accord S.C. Pub. Serv. Auth. v. FERC,* 762 F.3d 41, 54 (D.C. Cir. 2014). If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency's findings. *See Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) ("[W]e do not ask whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate

decision.").

II. THE COMMISSION REASONABLY RESPONDED TO THE *TRANSCANADA* COURT'S REMAND

The *TransCanada* Court took issue with the Commission's attempt to balance the costs of the Winter Reliability Program against its expected benefits in two respects. First, on the benefits side, the Court directed the Commission to better "explain what its 'balancing' entailed, or how it applied the non-cost factors" in its analysis. *TransCanada*, 811 F.3d at 13. On the cost side of the equation, the Court called on the Commission to better explain why it believed the Program's bid results did not permit excessive profits and instead constituted "just and reasonable" rates under the Federal Power Act. *Id.* at 12-13. The Commission's orders on remand address both issues.

A. The Commission Reasonably Explained The Value Of The Winter Reliability Program's Benefits

On remand, the Commission first reaffirmed its prior finding that New England faced a significant reliability risk going into the winter of 2013-2014. *See* Remand Order P 63, JA ___; *see also* Tariff Order PP 21, 30, JA ___, ___. And in fact, the Program proved "'invaluable'" during extreme winter conditions in 2013-2014 because "'generators

had the fuel they needed to run when called on by'" ISO New England. Remand Order P 63 n.128 (quoting Remarks by Peter Brandien, Vice President Operations ISO-New England in FERC Docket AD16-24-000 (Oct. 20, 2016)), JA ___.

In response to the Court's request for a better explanation of "what its 'balancing' entailed" (*TransCanada*, 811 F.3d at 13), the Commission acknowledged that "there was no tool available to precisely identify a dollar figure that represented the Program's value." Remand Order P 63, JA ___. But because the Program was designed to ensure that the lights stayed on during the winter of 2013-2014, the value of "loss of load" (i.e., involuntary power outages) was a reasonable proxy. *Id.* P 62, JA ___.

Reliable electric service provides public safety and economic benefits by facilitating the uninterrupted provision of public services and allowing customers to undertake economic and personal activity without disruption. *See* Letter from P. Hibbard, Analysis Group to ISO New England, Potential Benefits and Cost Solution to Address Risks Associated with New England's Reliance on Natural Gas at 2 (Jan. 24,

2013) (cited in Remand Order P 62 n.125, JA ___).[3] Analyses from the 2013 time period indicated that the "'economic impacts associated with loss of load (and thus the benefits of avoiding such interruptions) could reach into billions of dollars for a region the size of New England.'" Remand Order P 62 (quoting Hibbard Letter at 3), JA ___.

The Commission found it reasonable to use this "contemporaneous estimate" of the value of lost load "to consider the price customers may have been willing to pay in 2013" to avoid involuntary power outages "and to compare that to the $75 million price that the region's customers did pay" for the Winter Reliability Program. *Id.*; *see also id.* P 63 ("we continue to consider it reasonable for the Commission … to rely on the likelihood that the value of such lost load could be significant, because customers typically put great value on avoiding load shedding"), JA ___; *Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 775 (7th Cir. 2013) (noting that, while reliability benefits are difficult to calculate, they "are real and will benefit utilities and customers" in the region).

[3] The letter is available at: https://www.iso-ne.com/static-assets/documents/committees/comm_wkgrps/strategic_planning_discussion/materials/natural_gas_reliance.pdf.

B. The Commission Reasonably Analyzed The Program's Costs

On remand, the Commission undertook a number of analyses in response to the Court's call for a better explanation of the reasonableness of the Program's costs. Based on these analyses, and its evaluation of the Program's benefits, the Commission concluded that the Program's bid results were, on balance, just and reasonable. *See, e.g.*, Remand Order PP 61, 63, 68, 96, JA ___, ___, ___, ___.

1. The Commission compared the Program's bid results to a competitive benchmark

First, the Commission analyzed how much it would have cost New England consumers to obtain 1.95 million megawatt-hours of reliability service if, instead of the Program's actual pay-as-bid auction mechanism, ISO New England had instead used a uniform price auction. Under such an approach – which is used in ISO New England's energy and capacity markets – "[t]he price of the last unit of electricity purchased," i.e., the market-clearing price, is "paid to every supplier whose bid was accepted, regardless of its actual offer." *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. at 768; *see also Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1168 (D.C. Cir. 2016) (discussing auction mechanics in New England markets for capacity (i.e., the ability to

produce electricity three years in the future)).

In a uniform price auction, market participants have an incentive to bid based on their own marginal costs. *See* Remand Order P 65, JA ___. The Commission found that the Internal Market Monitor's cost-based supply curve reflects a reasonable estimate of these marginal costs, and thus a reasonable estimate of competitive bids in a uniform price auction. *Id.* PP 64-65, JA ___-___. Utilizing that curve yields a clearing price of $15.08 per million megawatt-hours per month, and a total cost of $88 million. *Id.* PP 65, 67, JA ___, ___. By contrast, the actual pay-as-bid auction procured 1.95 million megawatt hours of reliability service for $75 million, or approximately $12.82 per million megawatt-hour per month. The $13 million in cost savings versus a competitive uniform price auction "supports a finding that the total costs of the actual Winter Reliability Program were just and reasonable." *Id.* P 68, JA ___.

2. The Commission reasonably credited ISO New England's analysis of bidder behavior

The Commission also closely examined market power analyses filed by the Internal Market Monitor and ISO New England. Both used largely the same methods, model, and assumptions. *See* Remand Order

P 85, JA ___. Again, the analyses used cost estimates for each market participant to identify the highest expected marginal bid price (i.e., the price of the last quantity of megawatt-hours needed to meet the demand level ultimately established by ISO New England). *See* Market Monitor Report at 17-19, JA ___. In a competitive pay-as-bid auction, market participants would theoretically go through the same exercise, as the auction format provides an incentive to bid near this estimated price. *See id.* at 16, JA ___; *see also* Ethier Testimony at 3-5, JA ___ -___. Bid prices above this estimate were an indicator of the potential exercise of market power. *See* Market Monitor Report at 16, JA ___.

The Internal Market Monitor and ISO New England differed as to the assumed demand levels, with the Internal Market Monitor using 1.95 million megawatt-hours (the actual quantity procured in the auction) and ISO New England using 2.25 million megawatt-hours. *See* Remand Order P 85, JA ___*; see also supra* pp. 25-29.

a. ISO New England's procurement level better reflected bidder assumptions

The demand-level assumption is intended to reflect "the procurement expectation from the perspective of the participants." Remand Order P 87, JA ___. The Commission found that the 2.25

million megawatt-hour figure was a more reasonable reflection of bidders' expectations. *See id.* P 89, JA ___.

As the Commission explained, ISO New England's initial filing specified "that it would procure 'up to' 2.4 million [megawatt-hours] of the winter reliability service." *Id.* P 88 (quoting Tariff Filing at 1, JA ___), JA ___. Following its unsuccessful first auction, ISO New England filed Program amendments explaining that it had "sought" 2.4 million megawatt-hours and had adjusted the penalty structure to increase generator participation. *Id.* (quoting Emergency Amendment, Attachment C (Testimony of Kevin Kirby) at 2), JA ___. The Commission thus found that the record supported a finding that "participants would have bid with the expectation that [ISO New England] would attempt to procure near" the 2.4 million megawatt-hour target. *Id.*

b. At that level, there is no evidence of an exercise of market power

The Internal Market Monitor's cost-based supply curve intersects with the 2.25 million megawatt-hours-per-month procurement level at a price of $24.86 per million megawatt-hours per month. The Commission agreed that it was appropriate to adjust this price upward

by 25% to $31.08 million megawatt-hours per month. *See* Remand Order P 29, JA ___. As the Internal Market Monitor explained, since bidders would have different expectations for the marginal bid, "using the upper bound of a range of expected prices is more accurate in this circumstance." Market Monitor Report at 21, JA ___. In addition, in estimating the marginal bid, market participants had limited information regarding how much reliability service ISO New England would ultimately procure and how it would value the non-cost reliability characteristics associated with each generator. *Id.* at 20-21, JA ___-___. Auction participants would be expected to adjust their bid prices upward to account for this lack of information. *See* Remand Order P 90, JA ___; *see also infra* Argument III.C.2 (further discussing 25% upward adjustment).

When $31.08 is used as the expected marginal bid, "there is no evidence of the exercise of market power." Remand Order P 90, JA ___. "[N]o accepted bids from the auction exceeded that price," and thus "all accepted bids were reasonable." *Id.*

3. The Commission examined the particular features of the auction before concluding that market power was not exercised

The Commission also assessed whether market design rules and other factors restrained market participants from potentially exercising market power.

a. The Commission found it unlikely the participants knew whether they had market power

First, assuming that the market was not structurally competitive, the Commission found that there was no conclusive evidence that participants knew they had market power. *See* Remand Order P 93, JA ___. The Winter Reliability Program was an entirely new product market, "making it more difficult to determine which other oil-fired generators would choose to participate and then what quantity of service each would bid (to cover their costs and include profit sufficient to warrant their participation in the auction)." *Id.*

And while the Internal Market Monitor thought it was likely that participating generators knew they had market power because ISO New England's first auction did not attract sufficient demand, the Commission disagreed. *Id.* The entire purpose of ISO New England's Program amendments in advance of the second auction "was to increase

the quantity of supply offered into [that] auction" which would, in turn, increase "the competitiveness of the auction, all things being equal." *Id.* This assumption proved true: the second auction saw a greater than 50% supply increase, illustrating that the revised rules "significantly increased both participation and the competitiveness in that" auction. *Id.*

b. There was uncertainty as to the demand side of the market

The Commission found that market participants' behavior was also restrained by the fact that the auction rules vested ISO New England with broad discretion. As a result, there was significant uncertainty as to: (1) ISO New England's price-sensitivity at different procurement levels, and (2) how ISO New England would value the non-cost reliability factors associated with different generators. *See* Remand Order P 94, JA ___; *see also* Tariff Order PP 31-32 (discussing ISO New England's discretion in evaluating reliability factors and the amount of service to be purchased), JA ___-___.

In the auction, generators were faced with a single, price-sensitive buyer – "acting as a proxy for consumers on the demand side of the market" – with broad discretion to procure less than the sought-after

2.4 million megawatt-hours after seeing all of the bids. Remand Order P 95, JA __. And unlike other auctions in the New England markets, the parameters used by the System Operator to specify the demand curve were unknown to bidders. *Id.* P 95 n.185, JA __. Generators thus had to reckon with the possibility that unreasonably high bids could be rejected, particularly since ISO New England "was able to select the procurement level *after* seeing all of the bids." *Id.* P 95, JA ___. And because market participants could not know with precision how ISO New England would value one generator's non-cost reliability attributes versus another's, "participants would tend to bid closer to their estimated costs of providing the service." *Id.*

In sum, the Commission reasonably found that uncertainty as to the demand side of the market would "disincent participants from including unreasonably high (i.e., excessive) profit margins in their bids." *Id.* P 95, JA ___. And, as the Commission explained, "[t]he effectiveness of these deterrents can be judged by [ISO New England's] analysis and record evidence identifying $31.08 [million megawatt-hours-per-month] as a competitive benchmark price and that all selected bids in the auction were below this" price. *Id.* P 96, JA ___.

The Commission's conclusion was based on substantial evidence and worthy of deference. *See, e.g.*, *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1240 (D.C. Cir. 2005) ("Because there is substantial evidence in the record to support the Commission's conclusions, we defer to the Commission's evaluation of the experimental rate design."); *Md. Pub. Serv. Comm'n*, 632 F.3d at 1285 (determination of justness and reasonableness of rates is backed by substantial evidence where Commission reviewed analytical reports, including a report from the Independent System Operator's market monitor, that "specifically addressed the issue of market power").

III. IN OBJECTING TO THE COMMISSION'S USE OF A MARKET-BASED PARADIGM TO REVIEW THE PROGRAM'S BID RESULTS, TRANSCANADA MISINTERPRETS THE FEDERAL POWER ACT

The *TransCanada* court found that, if the Commission sought to use a market-based analysis of the Winter Reliability Program's bid results, it should explain "why it believed the Program was competitive" and the "economic forces that it believed restrained the suppliers in their confidential bid offers." *TransCanada*, 811 F.3d at 13. On remand, the Commission did just that. But according to TransCanada (Br. 27-36), the Commission may only rely on market forces to ensure

just and reasonable rates if the transactions at issue occurred pursuant to the Commission's market-based-rate program, whereby generators are pre-screened for market power and receive authorization to sell their services at whatever rate the market will bear. *See Morgan Stanley*, 554 U.S. at 537-38 (discussing Commission's market-based rates program). That is not the law; the Commission is not so constrained in rate-setting.

A. The Federal Power Act Permits The Commission To Utilize A Market-Based Paradigm To Assess Whether Rates Are Just And Reasonable

The "Commission [i]s not bound to use any single formula or combination of formulae in determining rates." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).[4] *See also Mobil Oil Corp. v. FPC*, 417 U.S. 283, 316 (1974) ("Mobil's argument assumes that there is only one just and reasonable rate" and it "must be based entirely on some concept of cost plus a reasonable rate of return. We rejected this argument in *Permian Basin* and we reject it again here."); *Morgan Stanley*, 554 U.S. at 532 ("We have repeatedly emphasized that the

[4] The Natural Gas Act and Federal Power Act are "in all material respects substantially identical," and therefore cited interchangeably. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

Commission is not bound to any one ratemaking formula."). Yet that is what TransCanada argues here.

In TransCanada's view, the only just and reasonable rates are those stemming from a transaction with a generator that has obtained market-based rate authority from the Commission (Br. 27-36), or those based on the generator's actual costs (Br. 37-38). *See id.* 36 ("Service purportedly provided at market-based rates, but without filed market-based rate tariff authorization for that service, violates FPA Section 205."). But "Congress carefully eschewed tying 'just and reasonable' rates to any particular method of deriving the rates. . . . Congress clearly intended to allow the Commission broad discretion in regard to the methodology of testing the reasonableness of rates." *Am. Pub. Power Ass'n v. FPC*, 522 F.2d 142, 146 (D.C. Cir. 1975).

The *TransCanada* Court echoed this broader construction of the Federal Power Act: "the Commission may determine rates via a variety of formulae, and rate determination methodologies may vary depending upon the circumstance of each case." 811 F.3d at 12. *See also Elec. Consumers*, 407 F.3d at 1236 (rejecting challenge to market design alleged to be "neither market-based nor cost-based but rather

administratively constructed" to incent behavior).

With respect to New England in particular, the Court has noted that its electricity markets "present[] intensely practical difficulties" and, as a result, the Commission must be afforded "latitude to balance the competing considerations and decide on the best resolution." *Blumenthal v. FERC*, 552 F.3d 875, 884-85 (D.C. Cir. 2009) (approving "hybrid" market design). In short, "it is the result reached, not the method employed which is controlling." *Hope Natural Gas*, 320 U.S. at 602. And here, the Commission, after a thorough analysis, reasonably concluded that the Winter Reliability Program's results were just and reasonable. *See supra* Argument Part II.

B. The Commission Reasonably Used A Market-Based Paradigm To Review The Bid Results

1. TransCanada's arguments regarding the Commission's market-based rate program are irrelevant

TransCanada spills much ink explaining how the Winter Reliability Program failed to comply with the dictates of the Commission's market-based rates program. Br. 27-36. But that is beside the point since the Winter Reliability Program "does not fall within the rubric of the Commission's market-based rate program."

Remand Rehearing Order P 18, JA ___.

The Commission's market-based rates program permits authorized sellers – i.e., those that the Commission has determined lack market power – to file tariffs with the Commission that simply state that the seller will enter into freely-negotiated contracts with purchasers. *See generally* Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, 72 Fed. Reg. 39,904 (2007), *aff'd Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011); *see also* 18 C.F.R. Part 35, Subpart H. Sellers do not need to file the subsequent transactions entered into pursuant to their market-based tariff, including auction offers, with the Commission for review. *See* Remand Rehearing Order P 19 n.47, JA ___. But the seller must file periodic reports summarizing the contracts it has entered into, and make periodic demonstrations that it still lacks market power. *See Morgan Stanley*, 554 U.S. at 837-38; *see also Cal. ex rel. Lockyer v. FERC,* 383 F.3d 1006, 1013 (9th Cir. 2004) (approving market-based tariffs); *La. Energy & Power Auth. v. FERC,* 141 F.3d 364, 365 (D.C. Cir.1998) (same).

By contrast, the Winter Reliability Program did not entail ongoing

sales of oil inventory service pursuant to an umbrella tariff authorizing market rates. Instead, it involved "a one-time process created for the purpose of maintaining reliability during the 2013-2014 winter season." Remand Rehearing Order P 18, JA ___. And unlike sales under the market-based rates program, the terms of the sales under the Winter Reliability Program were subject to Commission review via its "analysis of [ISO New England's] filed bid and auction results." *Id.*

In conducting that analysis, the Commission applied a market-based paradigm because the Program utilized market principles. *See* Remand Rehearing Order P 21, JA ___. The Program's bids "were based on an auction (a market mechanism)" and reflected "sellers bid[ding] against one another to provide the winter reliability service." Remand Order P 59, JA ___. The Commission's evaluation considered the competitiveness of the auction, including the existence of structural market power, whether there were market design rules to restrain the exercise of any such power, and whether the ultimate cost of the Program indicated that market power had been exercised. *Id.* PP 62-96, JA ___-___.

In response, TransCanada repeatedly points to the Commission's

description of the Winter Reliability Program as an "out-of-market" construct. *See* Br. 12, 22, 30 n.15, 31. But all that means is that "the Program existed outside of [ISO New England's] pre-existing structured, capacity, energy, and ancillary services markets." Remand Order P 59, JA ___. It is undisputed that the Program employed a market mechanism to secure oil inventory services. And it is undisputed that the Commission examined whether that mechanism resulted in the exercise of market power. While that examination may not have encompassed all of the features of the Commission's market-based rates program, that does not mean the results cannot be just and reasonable. *See supra* Argument Part III.A.

2. There is no merit to TransCanada's filed-rate and retroactive ratemaking arguments

TransCanada also argues that the Commission's use of a market-based paradigm to review the Winter Reliability Program violates the filed-rate doctrine and the rule against retroactive ratemaking because the participating generators did not have market-based rate tariffs for oil inventory service on file with the Commission. *See* Br. 32, 34. TransCanada is mistaken.

The filed-rate doctrine, and its corollary, the rule against retroactive ratemaking, prevent regulated entities from charging, and the Commission from approving, a rate different from the one on file with the Commission. *See, e.g.*, *SFPP, L.P. v. FERC*, 967 F.3d 788, 801-02 (D.C. Cir. 2020). Neither was violated here.

The rules of the Winter Reliability Program were filed in June 2013 and conditionally approved by the Commission in September 2013. *See* Tariff Order P 1, JA ___. Final approval was given after the Commission "assessed ISO New England's submissions" regarding the bid results and the System Operator's evaluation of those bids. *TransCanada*, 811 F.3d at 9. Those filings were properly noticed and the bid results addressed therein were the rates charged pursuant to the Program. *See* Remand Rehearing Order P 19, JA ___. There is thus no violation of the filed-rate doctrine or the rule against retroactive ratemaking. *See id*.

C. The Commission Reasonably Adopted The Internal Market Monitor's Cost-Based Supply Curve With An Upward Adjustment

1. The Commission reasonably relied upon the Internal Market Monitor's cost-based supply curve

TransCanada takes issue with the Commission's conclusion that the Internal Market Monitor's supply curve was "cost-based." Br. 47 (citing Remand Order PP 17-18, JA ___-___). TransCanada first notes that the prices utilized in the curve included various risk premiums. But that does not establish that the Commission erred in describing the curve as "cost-based." As the Commission explained, the market participants' "variable cost of participating in the Program was largely based on the risks faced by the participants, including three separate risk categories: price risk, liquidity risk, and penalty risk." Remand Order P 24, JA ___.

TransCanada also claims that the Internal Market Monitor did not assess whether the bidders' costs "were properly allocated between secondary fuel inventory service and other existing services." Br. 47. To the extent TransCanada is referencing the costs associated with the generators' normal (i.e., base) inventory and any incremental oil inventory, they are wrong. The Internal Market Monitor's cost analysis

"differentiat[ed] base from incremental oil inventory costs." *See* Market Monitor Report at B-2, JA ___.

TransCanada also criticizes the Internal Market Monitor for "simply accepting" the bidders' weighted average cost of capital. Br. 47-48. But as the Commission explained, this argument "disregards record evidence." Remand Rehearing Order P 27, JA ___. The Internal Market Monitor's report explains that there was, in fact, an evaluation of "'the reasonableness of the [weighted cost of capital data] values in terms of whether it reflected a likely firm-wide average borrowing rate.'" *Id*. (quoting Market Monitor Report at A-3,), JA ___.

2. The Commission reasonably relied upon the Internal Market Monitor's 25% adder

TransCanada raises a series of arguments in support of the notion that the Commission erred in relying upon the 25% adder the Internal Market Monitor utilized in its analysis. None has merit.

a. Purpose of the adder

Initially, it is important to note again the purpose of the adder. The Commission's analysis established $24.86 per million megawatt-hours per month – the intersection of the cost-based supply curve and a 2.25 million megawatt-hour procurement level – as a reasonable

estimate of the auction's expected marginal bid. *See* Remand Rehearing Order P 32, JA ___; *see also* Remand Order P 90, JA __. But the Commission found it was unreasonable to use that figure as a cap on the level of competitive bids. *See* Remand Rehearing Order P 32, JA __.[5]

First, "it is unreasonable to assume that all" of the necessary "cost estimates (especially participants' estimates of other participants' costs) would be precisely the same as the [Internal Market Monitor's]." Remand Rehearing Order P 30, JA ___. Second, the Winter Reliability Program was a novel market with many unknowns. A reasonable market participant "would adjust its bid upward to account for the high level of risk present." *Id.* P 31, JA ___. Third, it is reasonable "to assume that participants would have required a profit" (*id.* P 32), which, in a pay-as-bid auction, is based on an estimate of competitors' costs. *See* Remand Rehearing Order PP 74-75, JA ___-___.

To account for these variables, the Commission adopted the Internal Market Monitor's 25% adder, resulting in a price of $31.08

[5] ISO New England determined that $1.72 million in Program costs were attributable to bids in excess of $24.86/MWh-month. *See* Remand Order P 33, JA ___.

megawatt-hours per month. *See* Remand Rehearing Order P 33, JA ___. This figure reflects the upper bound of competitive orders – "that is, a price above which the Commission could confidently conclude participants were bidding uncompetitively (i.e., attempting to exercise market power)." *Id.*

The use of such adders is not novel. Indeed, when evaluating for the exercise of market power in other products and services, ISO New England's tariff "also includes adders (some of which are greater than 25%) that are applied to what are considered reasonable estimates for competitive offers." *Id.*

b. The level of the adder

TransCanada contends the adder "was not adequately supported." Br. 39. But as the Commission found, the adder was necessary to account for the fact that bidders likely adjusted their prices upward to account for the fact that they did not have the information necessary to precisely estimate their expectation of the marginal bid. *See* Remand Rehearing Order P 34 (citing Market Monitor Report at 20-21), JA ___.

A portion of the adder accounted for the fact that "different participants may have had different assumptions (e.g., oil prices, how to

hedge the risk of carrying oil beyond the end of the winter period, etc.)." *Id.* P 35, JA ___. The adder also accounted for the fact that, in a competitive pay-as-bid auction, participants are incented to bid just below the expected marginal price. Here, there was significant uncertainty regarding the amount of oil inventory service that would be purchased by the System Operator (i.e., the demand curve), and no historical figures upon which to estimate a supply curve. *Id.* P 36, JA ___. The Commission found that it was "reasonable to allot some portion of the adder to allow for this uncertainty." *Id.*

Finally, the Winter Reliability Program was a one-time auction. "There were no prior observations of similar program auction outcomes to use as a basis for how the auction would value this product." Market Monitor Report at 21, JA ___; *see also* Ethier Test. at 5 ("The ISO consistently hears from participants that they tread cautiously in a new market"), JA ___. As a result, "participants are less able to identify a competitive bid, and it is more difficult to differentiate between competitive versus uncompetitive bids." Remand Rehearing Order P 37, JA ___. The Commission therefore found it "reasonable to allow some portion of the adder to allow for this uncertainty." *Id.*

TransCanada complains that a uniform adder was used despite the possibility that there may have been "different expectations for a variety of participants." Br. 39; *see also id.* 48-49. But that is the point. The uncertainty surrounding key components of the auction could lead to varying estimates from varying bidders. The Commission found it necessary to establish an upper-bound estimate of the auction's expected marginal bid so that it could "confidently conclude" that any bids in excess of that price were an attempt to exercise market power. Remand Rehearing Order P 33, JA ___.

TransCanada also contends that the adder is "invalid" because it accounts for the incentive in a pay-as-bid auction to bid slightly below the projected marginal bid. Br. 40. But again, that is the point. A market participant's profit in a pay-as-bid auction depends on its ability to estimate the marginal bid. And here, the 25% adder was used to identify a reasonable upper-bound estimate of that bid. *See* Rehearing Remand Order P 33, JA ___.

TransCanada raises other quibbles with the Commission's use of the 25% adder – e.g., calling for more computations, noting that uncertain future events may not turn out as bad as estimated, and

disagreeing with the Internal Market Monitor's view as to generators' knowledge of their competitors' costs. *See* Br. 39-41. But the bottom line is that the Commission's decision to adopt the 25% adder was based on substantial evidence, regardless of whether some other amount may also have been reasonable. *See, e.g.*, *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 530 (D.C. Cir. 2010) ("even if [consultant's] testimony arguably could have supported a different conclusion on the costs and benefits of the marginal loss proposal, that would not mean FERC's conclusion lacked substantial evidence"); *see also Elec. Consumers*, 407 F.3d at 1240-41 (Commission decision is supported by substantial evidence when based on expert reports). And the fact that "ISO [New England] and the Internal Market Monitor agree with this decision underscores its reasonableness." *New England Power Generators Ass'n v. FERC*, 757 F.3d 283, 299 (D.C. Cir. 2014).

The decision here as to the appropriate analytical framework for assessing the Winter Reliability Program's bid results echoes the task that faced the Commission in *FERC v. Electric Power Supply Association*. In that case, the Commission had to determine the just and reasonable rate for demand response service (*i.e.*, the agreement

not to use electricity in response to a system operator's request). *See* 136 S.Ct. at 767. In affirming the Commission's choice of one valuation methodology over a competing, lower-priced methodology, the Supreme Court noted that "[t]he Commission, not this or any other court, regulates electricity rates." *Id.* at 784. In *Electric Power Supply Association,* as here, "the disputed question … involves both technical understanding and policy judgment." *Id.* And there, as here, "[t]he Commission addressed that issue seriously and carefully, providing reasons in support of its position and responding to the principal alternative advanced." *Id.* Reasoned decisionmaking requires no more.

D. The Commission Appropriately Focused On The Exercise Of Market Power, Not Simply Its Existence

TransCanada contends that the Commission's decision is arbitrary because the Commission failed to adequately consider factors indicating structural market power – e.g., bidders' knowledge that the first auction did not attract sufficient supply (Br. 41-42), and the lack of market mitigation measures (*id.* 18-20). But the Commission did address the Internal Market Monitor's conclusion that the auction was not structurally competitive. *See* Remand Order PP 78-84, JA ___-___.

The Commission explained how different assumptions regarding procurement levels could "reasonably lead to different conclusions regarding the presence of structural market power." *Id.* P 83, JA ___ Ultimately, however, the Commission found that the Internal Market Monitor's "methods, assumptions, and thresholds [were] reasonable." *Id.* P 84, JA ___.

The Commission explained that "'what matters is whether an individual seller is able to exercise anticompetitive market power, not whether the market as a whole is structurally competitive.'" *Id.* P 77 (quoting *Blumenthal*, 552 F.3d at 882). The Commission therefore assumed structural market power and assessed whether there were factors restraining the potential exercise of market power, and whether there was evidence that market power had been exercised. *See* Remand Order PP 85-96, JA ___-___; *see also supra* Argument II. Those are the pertinent questions in assessing whether the Program's rates were just and reasonable. *See TransCanada*, 811 F.3d at 13 (directing Commission "to explain the economic forces that it believed restrained the suppliers in their confidential bid offers").

IV. THE COURT LACKS JURISDICTION TO CONSIDER TRANSCANADA'S ARGUMENTS ON REVIEW THAT WERE NOT FIRST RAISED TO THE AGENCY ON REHEARING

Under the Federal Power Act, parties seeking judicial review of Commission orders must first seek rehearing of those orders and themselves raise to the Commission all of the objections raised on review, unless they can show a "reasonable ground" for their failure to do so. 16 U.S.C. § 825*l*(b). "Whether petitioners have complied with this unusually strict exhaustion requirement, hinges on whether their request for rehearing alerted the Commission to the legal arguments they now raise on judicial review." *Ameren Servs. Co. v. FERC*, 893 F.3d 786, 793 (D.C. Cir. 2018). Each argument must be raised with "specificity," *Wis. Power & Light Co. v. FERC*, 363 F.3d 453, 460 (D.C. Cir. 2004), and cannot be preserved "implicitly." *Kelley ex rel. Mich. Dep't of Nat'l Res. v. FERC*, 96 F.3d 1482, 1488 (D.C. Cir. 1996).

TransCanada's request for agency rehearing raised two issues: (1) whether the Commission "erred by finding that the bid results for the Program are just and reasonable based on a market-based paradigm," and (2) whether the Commission erred in relying "on a purported 'cost-based supply curve' … and a 25 percent upward

adjustment." TransCanada Request for Rehearing at 11-12 (May 1, 2020) (R. 57), JA ___-___. As the Commission found, TransCanada "present[ed] no other challenges" to the Commission's analysis. Remand Rehearing Order P 38, JA ___.

On appeal, however, TransCanada raises a series of additional issues. The Court lacks jurisdiction to consider them.

A. TransCanada's Complaints About The As-Bid Market Structure Are Barred

For example, TransCanada argues that the Commission erred by failing to account for the purported anti-competitive effects of the "pay-as-bid" market structure and other market design issues (e.g., not limiting the Program to new increments of fuel, modifying the penalty structure). Br. 45-46. These claims were not presented to the Commission on rehearing and are therefore barred. *See Ameren Servs.*, 893 F.3d at 793 (parties must "specifically – rather than implicitly or indirectly – raise claims before the Commission on rehearing").

Moreover, the Commission explained why an as-bid auction mechanism was appropriate here. Tariff Order P 54, JA ___; *see also* Remand Order P 66 n.132 (citing economic literature regarding as-bid and uniform clearing price auctions). And TransCanada ignores the

fact that, had a uniform price auction mechanism been employed, costs of approximately $88 million would have been expected, rather than the $75 million associated with the Winter Reliability Program. Remand Order P 67, JA ___; *see also supra* pp. 40-41 (explaining cost savings).

B. TransCanada's Complaints About The State Of The Record On Remand Are Barred

TransCanada raises various complaints regarding the state of the record on remand, claiming the Commission erred by purportedly failing to: (1) compel additional data from market participants (Br. 49-50), (2) discuss the actual bid data (Br. 50-53, 55-56), and (3) grant TransCanada access to confidential bid data (Br. 53-55). None of these matters were raised on rehearing and TransCanada has offered no grounds – much less reasonable grounds – for its failure to do so. *See e.g.*, *Save Our Sebasticook v. FERC*, 431 F.3d 379, 382 (D.C. Cir. 2005) ("a party must include its objection in a rehearing petition despite the fact that the point sought to be appealed was raised, considered and rejected in the original proceeding") (internal quotation omitted).

In any event, the Commission fully responded to the Court's direction to develop a record on remand by obtaining bid data from market participants and analyses from the Internal Market Monitor

and the System Operator. The Commission used that information to better explain why it believed "economic forces … restrained the suppliers in their confidential bid offers" and thus why the Program*'s* rates were just and reasonable. *TransCanada*, 811 F.3d at 13. "All of that together is enough." *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. at 784 (Commission adequately explained its choice of one valuation method over another).

CONCLUSION

The petitions for review should be denied and the Commission's orders on remand should be affirmed in all respects.

Respectfully submitted,

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March 12, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation established in the Court's November 10, 2020 order because this brief contains 12,330 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Century Schoolbook 14-point font using Microsoft Word 2010.

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ADDENDUM

STATUTES
AND
REGULATIONS

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§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, § 10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, § 10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, § 10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, § 10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof,

that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

(2) Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is—

(A) necessary because of an imminent threat to health or safety or other emergency;

(B) necessary for the enforcement of criminal laws;

(C) necessary for national security; or

(D) issued pursuant to any statute implementing an international trade agreement.

(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section.

(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—

(A) in the case of the Senate, 60 session days, or

(B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress adjourns a session of Congress through the date on which the same

conducted over the term of the existing license; and

(B) were not expressly considered by the Commission as contributing to the length of the existing license term in any order establishing or extending the existing license term.

(c) Commission determination

At the request of the licensee, the Commission shall make a determination as to whether any planned, ongoing, or completed investment meets the criteria under subsection (b)(2). Any determination under this subsection shall be issued within 60 days following receipt of the licensee's request. When issuing its determination under this subsection, the Commission shall not assess the incremental number of years that the investment may add to the new license term. All such assessment shall occur only as provided in subsection (a).

(June 10, 1920, ch. 285, pt. I, § 36, as added Pub. L. 115–270, title III, § 3005, Oct. 23, 2018, 132 Stat. 3867.)

SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824*o*–1, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824*o*–1, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term ''sale of electric energy at wholesale'' when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term ''public utility'' when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),[1] 824i, 824j, 824j–1, 824k, 824*o*, 824*o*–1, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate com-

[1] So in original. Section 824e of this title does not contain a subsec. (f).

pany or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms ''affiliate'', ''associate company'', ''electric utility company'', ''holding company'', ''subsidiary company'', and ''exempt wholesale generator'' shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

(June 10, 1920, ch. 285, pt. II, § 201, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 847; amended Pub. L. 95–617, title II, § 204(b), Nov. 9, 1978, 92 Stat. 3140; Pub. L. 102–486, title VII, § 714, Oct. 24, 1992, 106 Stat. 2911; Pub. L. 109–58, title XII, §§ 1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985; Pub. L. 114–94, div. F, § 61003(b), Dec. 4, 2015, 129 Stat. 1778.)

REFERENCES IN TEXT

The Rural Electrification Act of 1936, referred to in subsec. (f), is act May 20, 1936, ch. 432, 49 Stat. 1363, as amended, which is classified generally to chapter 31 (§ 901 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 901 of Title 7 and Tables.

The Public Utility Holding Company Act of 2005, referred to in subsec. (g)(5), is subtitle F of title XII of Pub. L. 109–58, Aug. 8, 2005, 119 Stat. 972, which is classified principally to part D (§ 16451 et seq.) of subchapter XII of chapter 149 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 15801 of Title 42 and Tables.

AMENDMENTS

2015—Subsec. (b)(2). Pub. L. 114–94, § 61003(b)(1), inserted ''824*o*–1,'' after ''824*o*,'' in two places.

Subsec. (e). Pub. L. 114–94, § 61003(b)(2), inserted ''824*o*–1,'' after ''824*o*,''.

2005—Subsec. (b)(2). Pub. L. 109–58, § 1295(a)(1), substituted ''Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title'' for ''The provisions of sections 824i, 824j, and 824k of this title'' and ''Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''Compliance with any order of the Commission under the provisions of section 824i or 824j of this title''.

Subsec. (e). Pub. L. 109–58, § 1295(a)(2), substituted ''section 824e(e), 824e(f), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''section 824i, 824j, or 824k of this title''.

Subsec. (f). Pub. L. 109–58, § 1291(c), which directed amendment of subsec. (f) by substituting ''political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year,'' for ''political subdivision of a state,'', was executed by making the substitution for ''political subdivision of a State,'' to reflect the probable intent of Congress.

Subsec. (g)(5). Pub. L. 109–58, § 1277(b)(1), substituted ''2005'' for ''1935''.

1992—Subsec. (g). Pub. L. 102–486 added subsec. (g).

1978—Subsec. (b). Pub. L. 95–617, § 204(b)(1), designated existing provisions as par. (1), inserted ''except as provided in paragraph (2)'' after ''in interstate commerce, but'', and added par. (2).

Subsec. (e). Pub. L. 95–617, § 204(b)(2), inserted ''(other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title)'' after ''under this subchapter''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by section 1277(b)(1) of Pub. L. 109–58 effective 6 months after Aug. 8, 2005, with provisions relating to effect of compliance with certain regulations approved and made effective prior to such date, see section 1274 of Pub. L. 109–58, set out as an Effective Date note under section 16451 of Title 42, The Public Health and Welfare.

STATE AUTHORITIES; CONSTRUCTION

Nothing in amendment by Pub. L. 102–486 to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102–486, set out as a note under section 796 of this title.

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

Pub. L. 95–617, title II, § 214, Nov. 9, 1978, 92 Stat. 3149, provided that:

''(a) PRIOR ACTIONS.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall apply to, or affect, any action taken by the Commission [Federal Energy Regulatory Commission] before the date of the enactment of this Act [Nov. 9, 1978].

''(b) OTHER AUTHORITIES.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall limit, impair or otherwise affect any authority of the Commission or any other agency or instrumentality of the United States under any other provision of law except as specifically provided in this title.''

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric en-

§ 824c. Issuance of securities; assumption of liabilities

(a) Authorization by Commission

No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after August 26, 1935.

(b) Application approval or modification; supplemental orders

The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) Compliance with order of Commission

No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Notes or drafts maturing less than one year after issuance

Subsection (a) shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) Public utility securities regulated by State not affected

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Guarantee or obligation on part of United States

Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Filing duplicate reports with the Securities and Exchange Commission

Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under sections 77g, 78*l*, and 78m of title 15.

(June 10, 1920, ch. 285, pt. II, § 204, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 850.)

TRANSFER OF FUNCTIONS

Executive and administrative functions of Securities and Exchange Commission, with certain exceptions, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term ''automatic adjustment clause'' means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(g) Inaction of Commissioners

(1) In general

With respect to a change described in subsection (d), if the Commission permits the 60-

day period established therein to expire without issuing an order accepting or denying the change because the Commissioners are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum—

(A) the failure to issue an order accepting or denying the change by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of section 825*l*(a) of this title; and

(B) each Commissioner shall add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change.

(2) Appeal

If, pursuant to this subsection, a person seeks a rehearing under section 825*l*(a) of this title, and the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request because the Commissioners are divided two against two, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum, such person may appeal under section 825*l*(b) of this title.

(June 10, 1920, ch. 285, pt. II, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851; amended Pub. L. 95–617, title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142; Pub. L. 115–270, title III, § 3006, Oct. 23, 2018, 132 Stat. 3868.)

AMENDMENTS

2018—Subsec. (g). Pub. L. 115–270 added subsec. (g).

1978—Subsec. (d). Pub. L. 95–617, § 207(a), substituted ''sixty'' for ''thirty'' in two places.

Subsec. (f). Pub. L. 95–617, § 208, added subsec. (f).

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95–617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anticompetitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order re-

Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, §311, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859.)

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Director of the Government Publishing Office under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, §312, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859; amended Pub. L. 113–235, div. H, title I, §1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

CHANGE OF NAME

''Director of the Government Publishing Office'' substituted for ''Public Printer'' in text on authority of section 1301(d) of Pub. L. 113–235, set out as a note under section 301 of Title 44, Public Printing and Documents.

''Government Publishing Office'' substituted for ''Government Printing Office'' in text on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided

in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860; amended June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, § 16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, § 16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

thereunder has issued one or more permits for the construction or modification of transmission facilities in a national interest electric transmission corridor designated by the Secretary, such facilities shall be deemed to either ensure reliability or reduce the cost of delivered power by reducing congestion for purposes of section 219(a).

[Order 679, 71 FR 43338, July 31, 2006, as amended by Order 679–A, 72 FR 1172, Jan. 10, 2007, Order 691, 72 FR 5174, Feb. 5, 2007]

Subpart H—Wholesale Sales of Electric Energy, Capacity and Ancillary Services at Market-Based Rates

SOURCE: Order 697, 72 FR 40038, July 20, 2007, unless otherwise noted.

§ 35.36 Generally.

(a) For purposes of this subpart:

(1) *Seller* means any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act.

(2) *Category 1 Seller* means a Seller that:

(i) Is either a wholesale power marketer that controls or is affiliated with 500 MW or less of generation in aggregate per region or a wholesale power producer that owns, controls or is affiliated with 500 MW or less of generation in aggregate in the same region as its generation assets;

(ii) Does not own, operate or control transmission facilities other than limited equipment necessary to connect individual generating facilities to the transmission grid (or has been granted waiver of the requirements of Order No. 888, FERC Stats. & Regs. ¶31,036);

(iii) Is not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the Seller's generation assets;

(iv) Is not affiliated with a franchised public utility in the same region as the Seller's generation assets; and

(v) Does not raise other vertical market power issues.

(3) *Category 2 Sellers* means any Sellers not in Category 1.

(4) *Inputs to electric power production* means intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; physical coal supply sources and ownership of or control over who may access transportation of coal supplies;

(5) *Franchised public utility* means a public utility with a franchised service obligation under State law.

(6) *Captive customers* means any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation.

(7) *Market-regulated power sales affiliate* means any power seller affiliate other than a franchised public utility, including a power marketer, exempt wholesale generator, qualifying facility or other power seller affiliate, whose power sales are regulated in whole or in part on a market-rate basis.

(8) *Market information* means non-public information related to the electric energy and power business including, but not limited to, information regarding sales, cost of production, generator outages, generator heat rates, unconsummated transactions, or historical generator volumes. Market information includes information from either affiliates or non-affiliates.

(9) *Affiliate* of a specified company means:

(i) Any person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company;

(ii) Any company 10 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company;

(iii) Any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate; and

(iv) Any person that is under common control with the specified company.

(v) For purposes of paragraph (a)(9), owning, controlling or holding with power to vote, less than 10 percent of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control.

(b) The provisions of this subpart apply to all Sellers authorized, or seeking authorization, to make sales for resale of electric energy, capacity or ancillary services at market-based rates unless otherwise ordered by the Commission.

[Order 697, 72 FR 40038, July 20, 2007, as amended by Order 697–A, 73 FR 25912, May 7, 2008; Order 697–B, 73 FR 79627, Dec. 30, 2008; Order 816, 80 FR 67108, Oct. 30, 2015; Order 816–A, 81 FR 33383, May 26, 2016]

EFFECTIVE DATE NOTE: By Order 860, 84 FR 36428, July 26, 2019, § 35.36 was amended by adding paragraph (a)(10), effective Oct. 1, 2020. For the convenience of the user, the added text is set forth as follows:

§ 35.36 Generally.

(a) * * *

(10) *Ultimate upstream affiliate means* the furthest upstream affiliate(s) in the ownership chain. The term ''upstream affiliate'' means any entity described in § 35.36(a)(9)(i).

* * * * *

§ 35.37 Market power analysis required.

(a)(1) In addition to other requirements in subparts A and B, a Seller must submit a market power analysis in the following circumstances: when seeking market-based rate authority; for Category 2 Sellers, every three years, according to the schedule posted on the Commission's Web site; or any other time the Commission directs a Seller to submit one. Failure to timely file an updated market power analysis will constitute a violation of Seller's market-based rate tariff.

(2) When submitting a market power analysis, whether as part of an initial application or an update, a Seller must include an appendix of assets, in the form provided in appendix B of this subpart, and an organizational chart. The organizational chart must depict the Seller's current corporate structure indicating all affiliates.

(b) A market power analysis must address whether a Seller has horizontal and vertical market power.

(c)(1) There will be a rebuttable presumption that a Seller lacks horizontal market power with respect to sales of energy, capacity, energy imbalance service, generation imbalance service, and primary frequency response service if it passes two indicative market power screens: a pivotal supplier analysis based on annual peak demand of the relevant market, and a market share analysis applied on a seasonal basis. There will be a rebuttable presumption that a Seller lacks horizontal market power with respect to sales of operating reserve-spinning and operating reserve-supplemental services if the Seller passes these two indicative market power screens and demonstrates in its market-based rate application how the scheduling practices in its region support the delivery of operating reserve resources from one balancing authority area to another. There will be a rebuttable presumption that a Seller possesses horizontal market power with respect to sales of energy, capacity, energy imbalance service, generation imbalance service, operating reserve-spinning service, operating reserve-supplemental service, and primary frequency response service if it fails either screen.

(2) Sellers and intervenors may also file alternative evidence to support or rebut the results of the indicative screens. Sellers may file such evidence at the time they file their indicative screens. Intervenors may file such evidence in response to a Seller's submissions.

(3) If a Seller does not pass one or both screens, the Seller may rebut a presumption of horizontal market power by submitting a Delivered Price Test analysis. A Seller that does not rebut a presumption of horizontal market power or that concedes market power, is subject to mitigation, as described in § 35.38.

(4) When submitting the indicative screens, a Seller must use the format provided in appendix A of this subpart and file the indicative screens in an electronic spreadsheet format. A Seller must include all supporting materials referenced in the indicative screens.

(5) In lieu of submitting the indicative market power screens, Sellers

studying regional transmission organization (RTO) or independent system operator (ISO) markets that operate RTO/ISO-administered energy, ancillary services, and capacity markets may state that they are relying on Commission-approved market monitoring and mitigation to address potential horizontal market power Sellers may have in those markets.

(6) In lieu of submitting the indicative market power screens, Sellers studying RTO or ISO markets that operate RTO/ISO-administered energy and ancillary services markets, but not capacity markets, may state that they are relying on Commission-approved market monitoring and mitigation to address potential horizontal market power that Sellers may have in energy and ancillary services. However, Sellers studying such RTOs/ISOs would need to submit indicative market power screens if they wish to obtain market-based rate authority for wholesale sales of capacity in these markets.

(7) Sellers submitting simultaneous transmission import limit studies must file Submittal 1, and, if applicable, Submittal 2, in the electronic spreadsheet format provided on the Commission's Web site.

(d) To demonstrate a lack of vertical market power, a Seller that owns, operates or controls transmission facilities, or whose affiliates own, operate or control transmission facilities, must have on file with the Commission an Open Access Transmission Tariff, as described in §35.28; provided, however, that a Seller whose foreign affiliate(s) own, operate or control transmission facilities outside of the United States that can be used by competitors of the Seller to reach United States markets must demonstrate that such affiliate either has adopted and is implementing an Open Access Transmission Tariff as described in §35.28, or otherwise offers comparable, non-discriminatory access to such transmission facilities.

(e) To demonstrate a lack of vertical market power in wholesale energy markets through the affiliation, ownership or control of inputs to electric power production, such as the transportation or distribution of the inputs to electric power production, a Seller must provide the following information:

(1) A description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, intrastate natural gas storage or distribution facilities;

(2) Physical coal supply sources and ownership or control over who may access transportation of coal supplies; and

(3) A Seller must ensure that this information is included in the record of each new application for market-based rates and each updated market power analysis. In addition, a Seller is required to make an affirmative statement that it and its affiliates have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.

(f) If the Seller seeks to protect any portion of a filing from public disclosure, the Seller must make its filing in accordance with the Commission's instructions for filing privileged materials and critical energy infrastructure information in §388.112 of this chapter.

[Order 697, 72 FR 40038, July 20, 2007, as amended by Order 697–B, 73 FR 79627, Dec. 30, 2008; Order 769, 77 FR 65475, Oct. 29, 2012; Order 784, 78 FR 46209, July 30, 2013; Order 816, 80 FR 67108, Oct. 30, 2015; Order 819, 80 FR 73977, Nov. 27, 2015; Order 861, 84 FR 36386, July 26, 2019]

EFFECTIVE DATE NOTE: By Order 860, 84 FR 36428, July 26, 2019, §36.37 was amended by revising paragraph (a), removing paragraph (c)(4), and redesignating paragraph (c)(5) through (7) as paragraphs (c)(4) through (6), respectively, effective Oct. 1, 2020. For the convenience of the user, the revised text is set forth as follows:

§ 35.37 Market power analysis required.

(a)(1) In addition to other requirements in subparts A and B, a Seller must submit a market power analysis in the following circumstances: When seeking market-based rate authority; for Category 2 Sellers, every three years, according to the schedule posted on the Commission's website; or any other time the Commission directs a Seller to submit one. Failure to timely file an updated market power analysis will constitute a violation of Seller's market-based rate tariff. The market power analysis must be preceded by a submission of information into a relational database that will include a list of the Seller's own assets, the assets of its non-market-based rate affiliate(s) and identification of its ultimate upstream affiliate(s).

The relational database submission will also include information necessary to generate the indicative screens, if necessary, as discussed in paragraph (c)(1) of this section. When seeking market-based rate authority, the relational database submission must also include other market-based information concerning category status, operating reserves authorization, mitigation, and other limitations.

(2) When submitting a market power analysis, whether as part of an initial application or an update, a Seller must include a description of its ownership structure that identifies all ultimate upstream affiliate(s). With respect to any investors or owners that a Seller represents to be passive, the Seller must affirm in its narrative that the ownership interests consist solely of passive rights that are necessary to protect the passive investors' or owners' investments and do not confer control. The Seller must also include an appendix of assets and, if necessary, indicative screens as discussed in paragraph (c)(1) of this section. A Seller must include all supporting materials referenced in the indicative screens. The appendix of assets and indicative screens are derived from the information submitted by a Seller and its affiliates into the relational database and retrievable in conformance with the instructions posted on the Commission's website.

* * * * *

§ 35.38 Mitigation.

(a) A Seller that has been found to have market power in generation or ancillary services, or that is presumed to have horizontal market power in generation or ancillary services by virtue of failing or foregoing the relevant market power screens, as described in 35.37(c), may adopt the default mitigation detailed in paragraph (b) of this section for sales of energy or capacity or paragraph (c) of this section for sales of ancillary services or may propose mitigation tailored to its own particular circumstances to eliminate its ability to exercise market power. Mitigation will apply only to the market(s) in which the Seller is found, or presumed, to have market power.

(b) Default mitigation for sales of energy or capacity consists of three distinct products:

(1) Sales of power of one week or less priced at the Seller's incremental cost plus a 10 percent adder;

(2) Sales of power of more than one week but less than one year priced at no higher than a cost-based ceiling reflecting the costs of the unit(s) expected to provide the service; and

(3) New contracts filed for review under section 205 of the Federal Power Act for sales of power for one year or more priced at a rate not to exceed embedded cost of service.

(c) Default mitigation for sales of ancillary services consist of: (1) A cap based on the relevant OATT ancillary service rate of the purchasing transmission operator; or (2) the results of a competitive solicitation that meets the Commission's requirements for transparency, definition, evaluation, and competitiveness.

[Order 697, 72 FR 40038, July 20, 2007, as amended by Order 784, 78 FR 46210, July 30, 2013]

§ 35.39 Affiliate restrictions.

(a) *General affiliate provisions.* As a condition of obtaining and retaining market-based rate authority, the conditions provided in this section, including the restriction on affiliate sales of electric energy and all other affiliate provisions, must be satisfied on an ongoing basis, unless otherwise authorized by Commission rule or order. Failure to satisfy these conditions will constitute a violation of the Seller's market-based rate tariff.

(b) *Restriction on affiliate sales of electric energy or capacity.* As a condition of obtaining and retaining market-based rate authority, no wholesale sale of electric energy or capacity may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization for the transaction under section 205 of the Federal Power Act. All authorizations to engage in affiliate wholesale sales of electric energy or capacity must be listed in a Seller's market-based rate tariff.

(c) *Separation of functions.* (1) For the purpose of this paragraph, entities acting on behalf of and for the benefit of a franchised public utility with captive customers (such as entities controlling or marketing power from the electrical generation assets of the franchised public utility) are considered part of the franchised public utility. Entities acting on behalf of and for the benefit

of the market-regulated power sales affiliates of a franchised public utility with captive customers are considered part of the market-regulated power sales affiliates.

(2) (i) To the maximum extent practical, the employees of a market-regulated power sales affiliate must operate separately from the employees of any affiliated franchised public utility with captive customers.

(ii) Franchised public utilities with captive customers are permitted to share support employees, and field and maintenance employees with their market-regulated power sales affiliates. Franchised public utilities with captive customers are also permitted to share senior officers and boards of directors with their market-regulated power sales affiliates; provided, however, that the shared officers and boards of directors must not participate in directing, organizing or executing generation or market functions.

(iii) Notwithstanding any other restrictions in this section, in emergency circumstances affecting system reliability, a market-regulated power sales affiliate and a franchised public utility with captive customers may take steps necessary to keep the bulk power system in operation. A franchised public utility with captive customers or the market-regulated power sales affiliate must report to the Commission and disclose to the public on its Web site, each emergency that resulted in any deviation from the restrictions of section 35.39, within 24 hours of such deviation.

(d) *Information sharing.* (1) A franchised public utility with captive customers may not share market information with a market-regulated power sales affiliate if the sharing could be used to the detriment of captive customers, unless simultaneously disclosed to the public.

(2) Permissibly shared support employees, field and maintenance employees and senior officers and board of directors under §§ 35.39(c)(2)(ii) may have access to information covered by the prohibition of § 35.39(d)(1), subject to the no-conduit provision in § 35.39(g).

(e) *Non-power goods or services.* (1) Unless otherwise permitted by Commission rule or order, sales of any non-power goods or services by a franchised public utility with captive customers, to a market-regulated power sales affiliate must be at the higher of cost or market price.

(2) Unless otherwise permitted by Commission rule or order, sales of any non-power goods or services by a market-regulated power sales affiliate to an affiliated franchised public utility with captive customers may not be at a price above market.

(f) *Brokering of power.* (1) Unless otherwise permitted by Commission rule or order, to the extent a market-regulated power sales affiliate seeks to broker power for an affiliated franchised public utility with captive customers:

(i) The market-regulated power sales affiliate must offer the franchised public utility's power first;

(ii) The arrangement between the market-regulated power sales affiliate and the franchised public utility must be non-exclusive; and

(iii) The market-regulated power sales affiliate may not accept any fees in conjunction with any brokering services it performs for an affiliated franchised public utility.

(2) Unless otherwise permitted by Commission rule or order, to the extent a franchised public utility with captive customers seeks to broker power for a market-regulated power sales affiliate:

(i) The franchised public utility must charge the higher of its costs for the service or the market price for such services;

(ii) The franchised public utility must market its own power first, and simultaneously make public (on the Internet) any market information shared with its affiliate during the brokering; and

(iii) The franchised public utility must post on the Internet the actual brokering charges imposed.

(g) *No conduit provision.* A franchised public utility with captive customers and a market-regulated power sales affiliate are prohibited from using anyone, including asset managers, as a conduit to circumvent the affiliate restrictions in §§ 35.39(a) through (g).

(h) *Franchised utilities without captive customers.* If necessary, any affiliate restrictions regarding separation of functions, power sales or non-power goods and services transactions, or brokering involving two or more franchised public utilities, one or more of whom has captive customers and one or more of whom does not have captive customers, will be imposed on a case-by-case basis.

[Order 697, 72 FR 40038, July 20, 2007, as amended by Order 697–A, 73 FR 25912, May 7, 2008]

§ 35.40 Ancillary services.

A Seller may make sales of ancillary services at market-based rates only if it has been authorized by the Commission and only in specific geographic markets as the Commission has authorized.

§ 35.41 Market behavior rules.

(a) *Unit operation.* Where a Seller participates in a Commission-approved organized market, Seller must operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that complies with the Commission-approved rules and regulations of the applicable market. A Seller is not required to bid or supply electric energy or other electricity products unless such requirement is a part of a separate Commission-approved tariff or is a requirement applicable to Seller through Seller's participation in a Commission-approved organized market.

(b) *Communications.* A Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences.

(c) *Price reporting.* To the extent a Seller engages in reporting of transactions to publishers of electric or natural gas price indices, Seller must provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the *Policy Statement on Natural Gas and Electric Price Indices*, issued by the Commission in Docket No. PL03–3–000, and any clarifications thereto. Seller must identify as part of its Electric Quarterly Report filing requirement in § 35.10b of this chapter the publishers of electricity and natural gas indices to which it reports its transactions. In addition, Seller must adhere to any other standards and requirements for price reporting as the Commission may order.

(d) *Records retention.* A Seller must retain, for a period of five years, all data and information upon which it billed the prices it charged for the electric energy or electric energy products it sold pursuant to Seller's market-based rate tariff, and the prices it reported for use in price indices.

[Order 697, 72 FR 40038, July 20, 2007, as amended by Order 768, 77 FR 61924, Oct. 11, 2012]

§ 35.42 Change in status reporting requirement.

(a) As a condition of obtaining and retaining market-based rate authority, a Seller must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, the following:

(1) Ownership or control of generation capacity or long-term firm purchases of capacity and/or energy that results in cumulative net increases (*i.e.*, the difference between increases and decreases in affiliated generation capacity) of 100 MW or more of capacity based on nameplate or seasonal capacity ratings, or, for solar photovoltaic facilities, nameplate capacity, or, for other energy-limited resources, nameplate or five-year average capacity factors, in any individual relevant geographic market, or of inputs to electric power production, or ownership, operation or control of transmission facilities; or

(2) Affiliation with any entity not disclosed in the application for market-based rate authority that:

(i) Owns or controls generation facilities or has long-term firm purchases of capacity and/or energy that results in cumulative net increases (*i.e.*, the difference between increases and decreases in affiliated generation capacity) of 100 MW or more of capacity based on nameplate or seasonal capacity ratings, or, for solar photovoltaic facilities, nameplate capacity, or, for other energy-limited resources, nameplate or five-year average capacity factors, in any individual relevant geographic market;

(ii) Owns or controls inputs to electric power production;

(iii) Owns, operates or controls transmission facilities; or

(iv) Has a franchised service area.

(b) Any change in status subject to paragraph (a) of this section must be filed no later than 30 days after the change in status occurs. Power sales contracts with future delivery are reportable 30 days after the physical delivery has begun. Failure to timely file a change in status report constitutes a tariff violation.

(c) When submitting a change in status notification regarding a change that impacts the pertinent assets held by a Seller or its affiliates with market-based rate authorization, a Seller must include an appendix of all assets, including the new assets and/or affiliates reported in the change in status, in the form provided in appendix B of this subpart, and an organizational chart. The organizational chart must depict the Seller's prior and new corporate structures indicating all affiliates unless the Seller demonstrates that the change in status does not affect the corporate structure of the Seller's affiliations.

[Order 697–D, 75 FR 14351, Mar. 25, 2010, as amended by Order 816, 80 FR 67108, Oct. 30, 2015; Order 816–A, 81 FR 33383, May 26, 2016]

EFFECTIVE DATE NOTE: By Order 860, 84 FR 36429, July 26, 2019, § 36.42 was amended by revising paragraphs (a)(2)(iii) and (iv); adding paragraph (a)(2)(v); revising paragraphs (b) and (c); and adding paragraph (d), effective Oct. 1, 2020. For the convenience of the user, the added and revised text is set forth as follows:

§ 35.42 Change in status reporting requirement.

(a) * * *

(2) * * *

(iii) Owns, operates or controls transmission facilities;

(iv) Has a franchised service area; or

(v) Is an ultimate upstream affiliate.

(b) Any change in status subject to paragraph (a) of this section must be filed quarterly. Power sales contracts with future delivery are reportable once the physical delivery has begun. Sellers shall file change in status in accordance with the following schedule: For the period from January 1 through March 31, file by April 30; for the period from April 1 through June 30, file by July 31; for the period July 1 through September 30, file by October 31; and for the period October 1 through December 31, file by January 31. Failure to timely file a change in status constitutes a tariff violation.

(c) Changes in status must be prepared in conformance with the instructions posted on the Commission's website.

(d) A Seller must report on a monthly basis changes to its previously-submitted relational database information, excluding updates to the horizontal market power screens. These submissions must be made by the 15th day of the month following the change. The submission must be prepared in conformance with the instructions posted on the Commission's website.

APPENDIX A TO SUBPART H OF PART 35—STANDARD SCREEN FORMAT

Appendix A: Standard Screen Format (Data provided for illustrative purposes only)
Part I – Pivotal Supplier Analysis

Staff Notes:

The file differs from the file published in the NOPR:
1. All entered values must be positive (no parenthesis/negative numbers)
2. The formulas (and the text in the row description) have been changed to reflect number 1.
3. The text in row 13 "Date of Filing" has been replaced with "Data Year"
4. Instruction: *Enter all numeric values as positive numbers (blue values)*

Don't enter values into an outlined cell (black values)

Applicant-> **Company X, LLC (TO)**
Market -> **Company X BAA**
Data Year -> **Dec 2011-Nov 2012**

Row			Reference
	Generation		
	Seller and Affiliate Capacity (owned or controlled)		
A	Installed Capacity (from inside the study area)	1,500	worksheet X
A1	Remote Capacity (from outside the study area)	200	worksheet X
B	Long-Term Firm Purchases (from inside the study area)	70	worksheet X
B1	Long-Term Firm Purchases (from outside the study area)	200	worksheet X
C	Long-Term Firm Sales (in and outside the study area)	500	worksheet X
D	Uncommitted Capacity Imports	0	worksheet X
	Non-Affiliate Capacity (owned or controlled)		
E	Installed Capacity (from inside the study area)	300	worksheet X
E1	Remote Capacity (from outside the study area)	50	worksheet X
F	Long-Term Firm Purchases (from inside the study area)	40	worksheet X
F1	Long-Term Firm Purchases (from outside the study area)	40	worksheet X
G	Long-Term Firm Sales (in and outside the study area)	60	worksheet X
H	Uncommitted Capacity Imports	2,500	worksheet X
I	Study Area Reserve Requirement	300	worksheet X
J	Amount of Line I Attributable to Seller, if any	200	
K	Total Uncommitted Supply (A+A1+B+B1+D+E+E1+F+F1+H-C-G-I-M)	2,840	
	Load		
L	Balancing Authority Area Annual Peak Load	1,500	worksheet X
M	Average Daily Peak Native Load in Peak Month	1,200	worksheet X
N	Amount of Line M Attributable to Seller, if any	900	worksheet X
O	Wholesale Load (L-M)	300	
P	Net Uncommitted Supply (K-O)	2,540	
Q	Seller's Uncommitted Capacity (A+A1+B+B1+D-C-J-N)	370	
	Result of Pivotal Supplier Screen (Pass if Line Q < Line P) (Fail if Line Q > Line P)	**Pass**	

Total Imports (Sum D,H), as filed by Seller ->	2,500
% of SIL for Seller's imported capacity ->	0.00
% of SIL for Other's imported capacity ->	1.00
SIL value* ->	2,500
Do Total Imports exceed the SIL value? ->	No

* Transmission owners filing triennials should use the SIL values from their Submittal 1, Row 10 (*see Puget Sound Energy, Inc.*, 135 FERC ¶ 61,254 (2011)) Other sellers should use Commission-accepted SIL values, if they exist for the study area and study period. If these values do not exist, sellers should use SIL values that have been filed but not accepted.

Appendix A: Standard Screen Format (Data provided for illustrative purposes only)
Part II – Market Share Analysis

Staff Notes:

The file differs from the file published in the NOPR:
1. All entered values must be positive (no parenthesis/negative numbers)
2. The formulas (and the text in the row description) have been changed to reflect number 1.
3. Instruction: *Enter all numeric values as positive numbers (blue values)*

Don't enter values into an outlined cell (black values)

Applicant-> **Company X, LLC (TO)**
Study Area -> **Company X BAA**
Data Year -> **Dec 2011-Nov 2012**
As filed by the Applicant/Seller

Row		Winter (MW)	Spring (MW)	Summer (MW)	Fall (MW)	Reference
	Seller and Affiliate Capacity (owned, controlled or under LT contract)					
A	Installed Capacity (inside the study area)	1,000	900	1,500	1,000	worksheet X
A1	Remote Capacity (from outside the study area)	400	300	200	200	worksheet X
B	Long-Term Firm Purchases (inside the study area)	60	40	70	30	worksheet X
B1	Long-Term Firm Purchases (from outside the study area)	200	200	200	200	worksheet X
C	Long-Term Firm Sales (in and outside the study area)	500	500	500	500	worksheet X
D	Seasonal Average Planned Outages	150	50	80	100	worksheet X
E	Uncommitted Capacity Imports	0	0	0	0	worksheet X
	Capacity Deductions					
F	Average Peak Native Load in the Season	1,000	900	1,200	800	worksheet X
G	Amount of Line F Attributable to Seller, if any	700	700	900	600	worksheet X
H	Amount of Line F Attributable to Non-Affiliates, if any	300	200	300	200	
I	Study Area Reserve Requirement	200	200	300	100	worksheet X
J	Amount of Line I Attributable to Seller, if any	100	100	200	80	worksheet X
K	Amount of Line I Attributable to Non-Affiliates, if any	100	100	100	20	
	Non-Affiliate Capacity (owned, controlled or under LT contract)					
L	Installed Capacity (inside the study area)	250	200	300	150	worksheet X
L1	Remote Capacity (from outside the study area)	50	50	50	50	worksheet X
M	Long-Term Firm Purchases (inside the study area)	30	30	30	30	worksheet X
M1	Long-Term Firm Purchases (from outside the study area)	40	30	40	20	worksheet X
N	Long-Term Firm Sales (in and outside the study area)	50	30	60	50	worksheet X
O	Seasonal Average Planned Outages	10	20	10	20	worksheet X
P	Uncommitted Capacity Imports	2,000	1,500	2,500	1,300	worksheet X
	Supply Calculation					
Q	Total Competing Supply (L+L1+M+M1+P-H-K-N-O)	1,910	1,460	2,450	1,260	
R	Seller's Uncommitted Capacity (A+A1+B+B1+E-C-D-G-J)	210	90	290	150	
S	Total Seasonal Uncommitted Capacity (Q+R)	2,120	1,550	2,740	1,410	
T	**Seller's Market Share** (R÷S)	9.9%	5.8%	10.6%	10.6%	
	Results (Pass if < 20% and Fail if ≥ 20%)	Pass	Pass	Pass	Pass	
U	Total Imports, as filed by Seller (E+P)	2,000	1,500	2,500	1,300	
V	SIL value*	2,000	1,500	2,500	1,300	
	Do Total Imports exceed SIL value? (is U<=V)	No	No	No	No	

* Transmission owners filing triennials should use the SIL values from their Submittal 1, Row 10 (*see Puget Sound Energy, Inc.*, 135 FERC ¶ 61,254 (2011)). Other sellers should use Commission-accepted SIL values, if they exist for the study area and study period. If these values do not exist, sellers should use SIL values that have been filed but not accepted.

[Order 816, 80 FR 67108, Oct. 30, 2015]

EFFECTIVE DATE NOTE: By Order 860, 84 FR 36429, July 26, 2019, appendix A to subpart H of part 35 was removed, effective Oct. 1, 2020.

Appendix B to Subpart H of Part 35—Corporate Entities and Assets Sample Appendix

	Instructions for completing the Asset Appendix Sheet: Generation Assets		
Column	Title	Format	Description
[A]	Filing Entity and its Energy Affiliates	Free Form Text	Name of the Filing Entity and its Affiliates. Please use the exact name as in the Company Registration database if possible.
[B]	Docket # where MBR authority was granted	Text in the form: ERXX-XXX-XXX where "X" is a digit	If applicable, Docket Number where MBR was originally granted.
[C]	Generation Name (Plant or Unit Name)	Free Form Text	Unit Name or if all units in a plant are reasonably similar, a plant name. Use EIA-860 or industry standard names to the extent possible.
[D]	Owned By	Free Form Text	Name of the Entity owning the generation unit or plant. Please use the same name as in the Company Registration database if possible.
[E]	Controlled By	Free Form Text	Name of the Entity that controls the output of the generation unit or plant. Please use the same name as in the Company Registration database if possible.
[F]	Date Control Transferred	MM/YYYY or DD/MM/YY	The date the unit came under the control of the Entity listed in "[E] Controlled By." Often it is the date the generation was acquired or built.
[G]	Location: Market/Balancing Authority Area	Free Form Text. For Markets or submarkets please use one of the abbreviations or names in the next column. For balancing authority areas please use the NERC-defined name	One of the six RTO/ISOs (ISO-NE, NYISO, PJM, MISO, SPP, CAISO) or their designated submarkets (PJM-East, 5004/5005, AP South, Connecticut, Southwest Connecticut, New York City, Long Island) or a NERC-defined Balancing Authority Area name.
[H]	Location: Geographic Region	Specific Text	One of the six MBR regions: Northeast, Southeast, Central, SPP, Northwest, Southwest.
[I]	In-Service Date	MM/YYYY or MM/DD/YY	The date the unit first came into service.
[J]	Capacity Rating: Nameplate (MW)	Numeric. Either an integer or fixed width numeric with one decimal	The nameplate capacity rating of the unit, usually provided by the manufacturer, in MWs.
[K]	Capacity Rating: Used in Filing (MW)	Numeric. Either an integer or fixed width numeric with one decimal	The capacity rating of the unit(s), in MWs, used in this filing.
[L]	Capacity Rating: Methodology Used in [K]: (N)ameplate, (S)easonal, 5-yr (U)nit, 5-yr (E)IA, (A)lternative		A single capital letter (either "N", "S","U","E", or "A") to designate the rating methodology of the unit's capacity used in this filing. Describe "Alternative" Capacity Rating Method in End Notes Sheet.
[M]	End Note Number (Enter text in End Notes Sheet)	Integer	The number of the explanatory note in End Notes Sheet that refers to this entry. The numbers should be ascending integers throughout the appendix. If there are three notes in the Generation Assets Sheet, then the first end note in the next asset sheet should be four (please do not start over with a new numbering sequence).

	Instructions for completing the Asset Appendix Sheet: Long-Term Firm Power Purchase Agreements (PPA)		
Column	Title	Format	Description
[A]	Filing Entity and its Energy Affiliates	Free Form Text	Name of the Filing Entity or affiliate of the Filing Entity that is purchasing the energy or capacity.
[B]	Seller Name	Free Form Text	Name of the Filing Entity that is selling the capacity and/or energy. Please use the exact name as in the Company Registration database if possible.
[C]	Amount of PPA (MW)	Numeric. Either an integer or fixed width numeric with one decimal	Contracted amount of the PPA in MW. If the contract is for the entire output of a specific generation unit, you may de-rate the unit using the same de-rating methodology that is used for generators of the same technology elsewhere in the appendix. If this amount is de-rated please explain in the End Notes Sheet. Energy-only contracts must be converted from MWh to MW. Only report contracts one year or longer.
[D]	Location: Market/Balancing Authority Area (Source)	Free Form Text. For Markets or submarkets please use one of the abbreviations or names in the next column. For balancing authority areas please use the NERC-defined name	One of the six RTO/ISOs (ISO-NE, NYISO, PJM, MISO, SPP, CAISO) or their designated submarkets (PJM-East, 5004/5005, AP South, Connecticut, Southwest Connecticut, New York City, Long Island) or a NERC-defined Balancing Authority Area name. For "System" PPAs, identify all markets and balancing authority areas from which the PPA is sourced to the extent the source location(s) is specified in the PPA.
[E]	Location: Market/Balancing Authority Area (Sink)	Free Form Text. For Markets or submarkets please use one of the abbreviations or names in the next column. For balancing authority areas please use the NERC-defined name	One of the six RTO/ISOs (ISO-NE, NYISO, PJM, MISO, SPP, CAISO) or their designated submarkets (PJM-East, 5004/5005, AP South, Connecticut, Southwest Connecticut, New York City, Long Island) or a NERC-defined Balancing Authority Area name. For all PPAs, identify where the capacity and/or energy is delivered.
[F]	Location: Geographic Region (Sink)	Specific Text	Same instruction as the Generation Assets Sheet.
[G]	Start Date (mo/da/yr)	MM/DD/YY	The Start Date of the PPA
[H]	End Date (mo/da/yr)	MM/DD/YY	The End Date of the PPA
[I]	Type of PPA (Unit or System)	"Unit" or "System"	Enter the text "Unit" if the PPA is from a specific unit such as a wind generator selling its output to a utility, or from multiple units at a single plant. Please provide the name of the unit or facility supplying the PPA in the End Notes Sheet. Enter "System" if the PPA is sourced from a utility's or IPP's fleet with different units providing power at different times.
[J]	End Note Number (Enter text in End Notes Sheet)	Integer	Same instruction as the Generation Assets Sheet.

	Instructions for completing the Asset Appendix Sheet: Transmission/Natural Gas Assets		
Column	Title	Format	Description
[A]	Filing Entity and its Energy Affiliates		Same instruction as the Generation Assets Sheet.
[B]	Cite to order accepting OATT or the order approving the transfer of transmission facilities to an RTO or ISO		Commission cite to the order accepting the Filing Entity's or its Energy Affiliate's current OATT, or the order transferring control of the transmission facilities to an RTO/ISO.
[C]	Asset Name and Use	Free Form Text	Legal name of the facility and brief description of the type of facility (i.e. transmission line or gas pipeline).
[D]	Owned By		Name of the Entity owning the transmission/natural gas assets.
[E]	Controlled By		Name of the Entity that controls the transmission/natural gas assets.
[F]	Date Control Transferred		Same instruction as the Generation Assets Sheet.
[G]	Market/Balancing Authority Area		Same instruction as the Generation Assets Sheet.
[H]	Geographic Region		Same instruction as the Generation Assets Sheet.
[I]	Size (e.g., length and kV for electric, length and diameter for pipelines, and capacity for gas storage)	Free Form Text	Description of the size of the facility in the measures relevant to the specific type of facility. For example, for electric "Size" refers to the length and kV rating of the transmission line; for gas pipeline "Size" refers to the length and diameter of the pipeline; for gas storage "Size" refers to the capacity of the facility.
[J]	End Note Number (Enter text in End Notes Sheet)		Same instruction as the Generation Assets Sheet.

	Instructions for completing the Asset Appendix Sheet: End Notes		
Column	Title	Format	Description
[A]	End Note Number	Integer	Should match an End Note number in the Generation Assets, Long-Term Firm PPAs or Transmission/Natural Gas Assets Sheets.
[B]	Sheet (Generation Assets, Long-Term Firm PPAs or Transmission/Natural Gas Assets)	The words "Generation", "PPA", or "Transmission/Natural Gas"	Indicates in which asset sheet the End Note is located.
[C]	Explanatory Note	Free Form Text	Text providing the clarification or explanatory note.

This is an example of the required appendix listing the filing entity and all its energy affiliates and their associated assets, which must be submitted with relevant market-based rate filings.

Asset Appendix: Generation Assets

[A]	[B]	[C]	[D]	[E]	[F]	[G]	[H]	[I]	[J]	[K]	[L]	[M]
						Location						
Filing Entity and its Energy Affiliates	Docket # where MBR authority was granted	Generation Name (Plant or Unit Name)	Owned By	Controlled By	Date Control Transferred	Market / Balancing Authority Area	Geographic Region	In-Service Date	Capacity Rating: Nameplate (MW)	Capacity Rating: Used in Filing (MW)	Capacity Rating: Methodology Used in [K]: (N)ameplate, (S)easonal, 5-yr (U)nit, 5-yr (E)IA, (A)lternative	End Note Number (Enter text in End Notes Sheet)

Asset Appendix: Long-Term Firm Power Purchase Agreements (PPA)

Note:
Energy-only contracts must be converted to MW
Only report contracts one year or longer

[A]	[B]	[C]	[D]	[E]	[F]	[G]	[H]	[I]	[J]
			Location						
Filing Entity and its Energy Affiliates	Seller Name	Amount of PPA (MW)	Market / Balancing Authority Area (Source)	Market / Balancing Authority Area (Sink)	Geographic Region (Sink)	Start Date (mo/da/yr)	End Date (mo/da/yr)	Type of PPA (Unit or System)	End Note Number (Enter text in End Notes Sheet)

Asset Appendix: Transmission/Natural Gas Assets

Electric Transmission Assets and/or Natural Gas Intrastate Pipelines and/or Gas Storage Facilities

[A]	[B]	[C]	[D]	[E]	[F]	[G]	[H]	[I]	[J]
						Location		Size	
Filing Entity and its Energy Affiliates	Cite to order accepting OATT or order approving the transfer of transmission facilities to an RTO or ISO	Asset Name and Use	Owned By	Controlled By	Date Control Transferred	Market / Balancing Authority Area	Geographic Region	Size (e.g., length and kV for electric, length and diameter for pipelines, and capacity for gas storage)	End Note Number (Enter text in End Notes Sheet)

		Asset Appendix: End Notes
		End Notes for Entries in the Generation, Long-Term Firm PPA and Transmission/Natural Gas Assets Sheets
[A]	[B]	[C]
End Note Number	Sheet (Generation, PPA or Transmission / Natural Gas)	Explanatory Note

[Order 816–A, 81 FR 33383, May 26, 2016]

EFFECTIVE DATE NOTE: By Order 860, 84 FR 36429, July 26, 2019, appendix B to subpart H of part 35 was removed, effective Oct. 1, 2020.

Subpart I—Cross-Subsidization Restrictions on Affiliate Transactions

SOURCE: 73 FR 11025, Feb. 29, 2008, unless otherwise noted.

§ 35.43 Generally.

(a) For purposes of this subpart:

(1) *Affiliate* of a specified company means:

(i) For any person other than an exempt wholesale generator:

(A) Any person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company;

(B) Any company 10 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company;

(C) Any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate; and

(D) Any person that is under common control with the specified company.

(E) For purposes of paragraph (a)(1)(i) of this section, owning, controlling or holding with power to vote, less than 10 percent of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control.

(ii) For any exempt wholesale generator (as defined under §366.1 of this chapter), consistent with section 214 of the Federal Power Act (16 U.S.C. 824m), which provides that ''affiliate'' will have the same meaning as provided in section 2(a) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79b(a)(11)):

(A) Any person that directly or indirectly owns, controls, or holds with power to vote, 5 percent or more of the outstanding voting securities of the specified company;

(B) Any company 5 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company;

(C) Any individual who is an officer or director of the specified company, or of any company which is an affiliate thereof under paragraph (a)(1)(ii)(A) of this section; and

(D) Any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate.

apply to subpoenas directed to former Commission employees if the subpoenas seek nonpublic materials or information acquired during Commission employment. The provisions of paragraph (c) of this section will also apply to subpoenas directed to the Commission.

(2) For purposes of this section,

(i) *Employees*, except where otherwise specified, includes ''special government employees'' and other Commission employees; and

(ii) *Nonpublic* includes any material or information which is exempt from availability for public inspection and copying;

(iii) *Special government employees* includes consultants and other employees as defined by section 202 of Title 18 of the United States Code.

(iv) *Subpoena* means any compulsory process in a case or matter, including a case or matter to which the Commission is not a party;

(b) Any employee who is served with a subpoena must promptly advise the General Counsel of the Commission of the service of the subpoena, the nature of the documents or information sought, and all relevant facts and circumstances. Any former employee who is served with a subpoena that concerns nonpublic information shall promptly advise the General Counsel of the Commission of the service of the subpoena, the nature of the documents or information sought, and all relevant facts and circumstances.

(c) A party causing a subpoena to be issued to the Commission or any employee or former employee of the Commission must furnish a statement to the General Counsel of the Commission. This statement must set forth the party's interest in the case or matter, the relevance of the desired testimony or documents, and a discussion of whether the desired testimony or documents are reasonably available from other sources. If testimony is desired, the statement must also contain a general summary of the testimony and a discussion of whether Commission records could be produced and used in lieu of testimony. Any authorization for testimony will be limited to the scope of the demand as summarized in such statement.

(d) Commission records or information which are not part of the public record will be produced only upon authorization by the Commission.

(e) The Commission or its designee will consider and act upon subpoenas under this section with due regard for statutory restrictions, the Commission's Rules of Practice and Procedure, and the public interest, taking into account factors such as applicable privileges including the deliberative process privilege; the need to conserve the time of employees for conducting official business; the need to avoid spending the time and money of the United States for private purposes; the need to maintain impartiality between private litigants in cases where a substantial government interest is not involved; and the established legal standards for determining whether justification exists for the disclosure of confidential information and records.

(f) The Commission authorizes the General Counsel or the General Counsel's designee to make determinations under this section.

§ 388.112 Requests for privileged treatment for documents submitted to the Commission.

(a) *Scope.* By following the procedures specified in this section, any person submitting a document to the Commission may request privileged treatment for some or all of the information contained in a particular document that it claims is exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552 (FOIA), and should be withheld from public disclosure. For the purposes of the Commission's filing requirements, non-CEII subject to an outstanding claim of exemption from disclosure under FOIA will be referred to as privileged material. The rules governing CEII are contained in § 388.113.

(b) *Procedures for filing and obtaining privileged material.* (1) General Procedures. A person requesting that material be treated as privileged information must include in its filing a justification for such treatment in accordance with the filing procedures posted on the Commission's Web site at *http://www.ferc.gov*. A person requesting that

a document filed with the Commission be treated as privileged in whole or in part must designate the document as privileged in making an electronic filing or clearly indicate a request for such treatment on a paper filing. The cover page and pages or portions of the document containing material for which privileged treatment is claimed should be clearly labeled in bold, capital lettering, indicating that it contains privileged or confidential information, as appropriate, and marked ''DO NOT RELEASE.'' The filer also must submit to the Commission a public version with the information that is claimed to be privileged material redacted, to the extent practicable.

(2) Procedures for Proceedings with a Right to Intervene. The following procedures set forth the methods for filing and obtaining access to material that is filed as privileged in complaint proceedings and in any proceeding to which a right to intervention exists:

(i) If a person files material as privileged material in a complaint proceeding or other proceeding to which a right to intervention exists, that person must include a proposed form of protective agreement with the filing, or identify a protective agreement that has already been filed in the proceeding that applies to the filed material. This requirement does not apply to material submitted in hearing or settlement proceedings, or if the only material for which privileged treatment is claimed consists of landowner lists or privileged information filed under §§ 380.12(f) and 380.16(f) of this chapter.

(ii) The filer must provide the public version of the document and its proposed form of protective agreement to each entity that is required to be served with the filing.

(iii) Any person who is a participant in the proceeding or has filed a motion to intervene or notice of intervention in the proceeding may make a written request to the filer for a copy of the complete, non-public version of the document. The request must include an executed copy of the protective agreement and a statement of the person's right to party or participant status or a copy of their motion to intervene or notice of intervention. Any person may file an objection to the proposed form of protective agreement. A filer, or any other person, may file an objection to disclosure, generally or to a particular person or persons who have sought intervention.

(iv) If no objection to disclosure is filed, the filer must provide a copy of the complete, non-public document to the requesting person within 5 days after receipt of the written request that is accompanied by an executed copy of the protective agreement. If an objection to disclosure is filed, the filer shall not provide the non-public document to the person or class of persons identified in the objection until ordered by the Commission or a decisional authority.

(v) For material filed in proceedings set for trial-type hearing or settlement judge proceedings, a participant's access to material for which privileged treatment is claimed is governed by the presiding official's protective order.

(vi) For landowner lists, information filed as privileged under §§ 380.12(f) and 380.16(f) of this chapter, forms filed with the Commission, and other documents not covered above, access to this material can be sought pursuant to a FOIA request under § 388.108. Applicants are not required under paragraph (b)(2)(iv) of this section to provide intervenors with landowner lists and the other materials identified in the previous sentence.

(c) *Effect of privilege or CEII claim.* (1) For documents filed with the Commission:

(i) The documents for which privileged treatment is claimed will be maintained in the Commission's document repositories as non-public until such time as the Commission may determine that the document is not entitled to the treatment sought and is subject to disclosure consistent with § 388.108. By treating the documents as nonpublic, the Commission is not making a determination on any claim of privilege status. The Commission retains the right to make determinations with regard to any claim of privilege status, and the discretion to release information as necessary to carry out its jurisdictional responsibilities.

(ii) The request for privileged treatment and the public version of the document will be made available while the request is pending.

(2) For documents submitted to Commission staff. The notification procedures of paragraphs (d), (e), and (f) of this section will be followed before making a document public.

(d) *Notification of request and opportunity to comment.* When a FOIA requester seeks a document for which privilege status has been claimed, or when the Commission itself is considering release of such information, the Commission official who will decide whether to release the information or any other appropriate Commission official will notify the person who submitted the document and give the person an opportunity (at least five calendar days) in which to comment in writing on the request. A copy of this notice will be sent to the requester.

(e) *Notification before release.* Notice of a decision by the Commission, the Chairman of the Commission, the Director, Office of External Affairs, the General Counsel or General Counsel's designee, a presiding officer in a proceeding under part 385 of this chapter, or any other appropriate official to deny a claim of privilege, in whole or in part, will be given to any person claiming that the information is privileged no less than 5 calendar days before disclosure. The notice will briefly explain why the person's objections to disclosure are not sustained by the Commission. A copy of this notice will be sent to the FOIA requester.

(f) Notification of suit in Federal courts. When a FOIA requester brings suit to compel disclosure of information for which a person has claimed privileged treatment, the Commission will notify the person who submitted the documents of the suit.

[Order 769, 77 FR 65476, Oct. 29, 2012, as amended by Order 833, 81 FR 93748, Dec. 21, 2016]

§ 388.113 Critical Energy/Electric Infrastructure Information (CEII).

(a) *Scope.* This section governs the procedures for submitting, designating, handling, sharing, and disseminating Critical Energy/Electric Infrastructure Information (CEII) submitted to or generated by the Commission. The Commission reserves the right to restrict access to previously filed information as well as Commission-generated information containing CEII. Nothing in this section limits the ability of any other Federal agency to take all necessary steps to protect information within its custody or control that is necessary to ensure the safety and security of the electric grid. To the extent necessary, such agency may consult with the CEII Coordinator regarding the treatment or designation of such information.

(b) *Purpose.* The procedures in this section implement section 215A of the Federal Power Act, and provide a comprehensive overview of the manner in which the Commission will implement the CEII program.

(c) *Definitions.* For purposes of this section:

(1) *Critical electric infrastructure information* means information related to critical electric infrastructure, or proposed critical electrical infrastructure, generated by or provided to the Commission or other Federal agency other than classified national security information, that is designated as critical electric infrastructure information by the Commission or the Secretary of the Department of Energy pursuant to section 215A(d) of the Federal Power Act. Such term includes information that qualifies as critical energy infrastructure information under the Commission's regulations. Critical Electric Infrastructure Information is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(3) and shall not be made available by any Federal, State, political subdivision or tribal authority pursuant to any Federal, State, political subdivision or tribal law requiring public disclosure of information or records pursuant to section 215A(d)(1)(A) and (B) of the Federal Power Act.

(2) *Critical energy infrastructure information* means specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that:

(i) Relates details about the production, generation, transportation, transmission, or distribution of energy;

CERTIFICATE OF SERVICE

I hereby certify that, on March 12, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Robert M. Kennedy
Robert M. Kennedy
Senior Attorney